88-1708

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-

In the Supreme Court Of The United States

OCTOBER TERM, 1988

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a criminal prosecution under the Export Administration Act, Congress intended to create an enforcement system in which the guilt-determinative issue of fact, whether the exported commodity was listed on the Commodity Control List and therefore required a validated license before export, shall be conclusively determined by the Secretary of Commerce, rather than by the trier of fact -- in this case, the jury.

2. Whether, if the Export Administration Act is interpreted to vest this irrebutable guilt-determinative power in the Secretary of Commerce, such interpretation would deprive the defendant in such crimninal prosecutions of the right to trial by jury guaranteed by the sixth amendment and deny the defendant due process rights guaranteed by the fifth amendment of the United States Constituition.

3. Whether, under the terms of the Export Administration Act, if a commodity cannot lawfully be subjected to export controls because it has been determined by the Secretary of Commerce to be available without restriction from sources outside the United States and has appropriate non-strategic end uses, the export of the commodity without a license can be deemed to violate the Act in a criminal prosecution.

THE PARTIES

The petitioners, named in the caption, were defendents and appellants below. Walter J. Spawr and Frances Spawr are individuals who are husband and wife. Spawr Optical Research, Inc., is a closely held corporation, wholly owned by the Spawr family. The appellee below, respondent in this Court, is the United States of America.

TABLE OF CONTENTS

Page

Questions Presented..... i

The Parties..... ii

Opinions Below..... 1

Jurisdiction..... 1

Statute Involved..... 2

Statement..... 2

Reasons for Granting the Writ..... 9

I. The Statutory Question..... 14

II. The Constitutional Question..... 18

III. The Secretary of Commerce Could Not Lawfully Have Listed The Mirrors on the CCL..... 22

Conclusion..... 25

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit..... 1a

APPENDIX B

Order of the United States District Court for the Central District of California..... 17a

APPENDIX C

Opinion of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *en banc*..... 27a

APPENDIX D

Title 50, Appendix - War and National Defense §§ 2401 - 2413..... 28a

APPENDIX E

15 C.F.R. 399.1..... 32a

APPENDIX F

15 C.F.R. 399.2, Interpretation 29..... 33a

APPENDIX G

July 2, 1987 Letter from Daniel O. Hill..... 40a
OC Document No. 5653..... 42a

APPENDIX H

Declaration of Alan E. Hill..... 44a

TABLE OF AUTHORITIES

Page

CASES

Apodaca v. *Oregon*, 406 U.S. 404 (1972)..... 19

Brady v. *Maryland*, 373 U.S. 83 (1963)..... 4,8

Dart v. *United States*, 848 F.2d 217 (1988)..... 12

Duncan v. *Louisiana*, 391 U.S. 145 (1968)..... 19

Estep v. *United States*, 327 U.S. 114 (1946)..... 13,14,17, 25

In re Winship, 397 U.S. 358 (1970)..... 12,13,20, 22

Morissette v. *United States*, 342 U.S. 246 (1952)..... 22

Muianey v. *Wilbur*, 421 U.S. 684 (1975)..... 21

Sandstrom v. *Montana*, 442 U.S. 510 (1979)..... 13,21,22

Speiser v. *Randall*, 357 U.S. 513 (1958)..... 21

Singer v. *United States*, 380 U.S. 24 (1965)..... 20

Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Engineering*, 467 U.S. 138 (1984)..... 12

United States v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987)..... 10,11

United States v. *Mandel*, 696 F. Supp. 505 (E.D. Cal. 1988)..... 11

United States v. *Mendoza -Lopez*, 481 U.S. 828 (1987)..... 14,17,25

United States v. *Moller-Butcher*, 560 F. Supp 550 (D. Mass. 1983)..... 7,10,11,

United States v. *Spawr Optical Research, Inc.* 864 F.2d 1467 (9th Cir. 1988)..... *passim*

Williams v. *Florida*, 399 U.S. 78 (1970)..... 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V..... 7,12

U.S. Const. amend. VI..... 7,19,20

STATUTES

Administrative Procedure Act, 5 U.S.C. § 704 (1982)..... 5,7,10,14 15,16

Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969), *as amended by* Pub. L. No. 92-412, 86 Stat. 644 (1972) and Pub. L. No. 93-500, 88 Stat. 1553 (1974) (current version at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. IV 1986))..... *passim*

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v.
UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Spawr Optical Research, Inc., Walter J. Spawr, and Frances Spawr respectfully pray that a writ of certiorari issue to review the judgment of the court of appeals entered in this case on December 29, 1988.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 864 F.2d 1467 and are annexed hereto as Appendix A. The district court opinion is unreported and is annexed hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1988. A timely petition for rehearing and

suggestion for a rehearing *en banc* was denied on February 23, 1989. The order denying rehearing is annexed hereto as Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

In Appendices D and E, there are, respectively set forth in pertinent part, the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969), *as amended by* Pub. L. No. 92-412, 86 Stat. 644 (1972) and Pub. L. No. 93-500, 88 Stat. 1553 (1974) (current version at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. IV 1986)), and provisions of the Code of Federal Regulations pertaining thereto.

STATEMENT

This case concerns an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would effectively preclude trial by jury in criminal prosecutions brought under the Export Administration Act (EAA) for exporting commodities without a validated license.

Under this order, whenever the Secretary of Commerce determines a commodity is in fact on the Commodity Control List (CCL), and thereby requires an export license, the trier of fact must accept this determination as final. The prosecution is relieved of proving as an element of the crime that the commodity was listed on the CCL and required a valid license before export. Intentional export without a license would automatically be a crime because the accused would not be allowed to present as a defense the fact that the commodity was

not on the CCL and did not require an export license. The Secretary -- not the judge nor the jury -- would have the power under this order to determine guilt in a criminal proceeding and that determination would be final and unreviewable.

This extraordinary interpretation of the EAA arises out of a criminal prosecution in which petitioners in 1980 were convicted of exporting optical laser mirrors without obtaining a validated export license required by the statute for commmodities that have been listed on the CCL by officials acting for the Secretary of Commerce. The case was tried in the United States District Court for the Central District of California before a jury. The Honorable William M. Byrne, Jr. presided at the trial and also conducted the 28 U.S.C. § 2255 (1982) proceeding. Judge Bryne denied section 2255 relief and his order was affirmed by a divided panel of the court of appeals, the decision that is the subject of this petition.

At the trial, it was stipulated that petitioners had exported the optical laser mirrors and that petitioners did not have a validated export license. The sole disputed issue was whether the mirrors exported by petitioners had been listed on the CCL by the Secretary, and therefore required a validated export license before they could lawfully be exported. This issue was guilt-determinative. If the mirrors had been listed on the CCL, the export without a license constituted a violation of the Act. If the mirrors had not been listed, there is no dispute that they could be freely exported without a license, that no crime was committed, and petitioners were wrongfully convicted.

There is no dispute that the trial judge read voluminous instructions to the jury and submitted this disputed question of fact, whether the mirrors had been listed on the CCL, to the jury. When, however, petitioners in the section 2255

proceeding adduced proof that the prosecution had, *inter alia*, suppressed evidence that the mirrors had not been listed on the CCL, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that the prosecutor had, in order to establish that the mirrors were in fact listed on the CCL, also knowingly provided the judge and jury with a bogus list instead of the authentic CCL,[1] the district court found that petitioners were not materially prejudiced by this suppression of evidence and prosecutorial misconduct because the issue of whether the Spawrs' optical laser mirrors were included on the CCL was not a triable issue and because "[t]he issue is not one which goes to the jury." (App. 24a.) For the same reason, the court found that petitioners were not materially prejudiced by the failure of their trial counsel to conduct any discovery, to depose any witnesses, to request any documents, to propound any interrogatories or, with one exception, even to interview possible defense witnesses.

After review *de novo*, a divided panel of the court of appeals affirmed on the ground that the petitioners had failed to show that the suppression of exculpatory evidence and the prosecutorial misconduct were material to the outcome of the trial and had been prejudicial. The majority accepted the view of the district court that the issue of whether the optical laser mirrors were in fact listed on the CCL "was not a disputable issue in their criminal trial." (App. 9a.) The court reasoned

[1]The bogus list was "Interpretation 29," a document published by the Department of Commerce which comprises the list of commodities which may not be exported to Cuba, Cambodia, Libya, North Korea and North Vietnam. (App. 39a.) By its terms, the listed commodities may be freely exported to any other country in the world without license. The prejudice resulted because "Interpretation 29" listed "optical elements and appliances," which misled both judge and jury.

that the suppression of exculpatory evidence and prosecutorial misconduct:

> can only be material if this licensing issue was in controversy during trial. If the issue was not in controversy, the Spawrs would hardly be entitled to relief based on the prosecutor's misconduct regarding evidence probative of that issue or defense counsel's failure to detect such misconduct.

(App. 10a.)

The judgment, of which review is sought, rests on the holding that the issue of whether the optical laser mirrors were included on the CCL is not a triable issue in a criminal trial even though it is guilt-determinative, but instead, judges and juries in individual criminal proceedings must defer to the determination by the Secretary of Commerce that a commodity has, in fact, been listed on the CCL.

This judgment rests on a series of imbricated reasons arising from the majority's interpretation of the so-called "finality clause" of the EAA, in force at the time of the export in question, which precludes judicial review of certain functions exercised and certain orders issued by the Secretary under the EAA. Section 2407 proclaims that "functions exercised under this Act are excluded from the operation of" those sections of the Administrative Procedure Act (APA) that guarantee judicial review for persons "adversely affected or aggrieved by agency actions." This provision clearly precludes judicial review of the *appropriateness* of an order by the Secretary, *inter alia*, listing a commodity on the CCL. This provision was enacted according to the majority to prevent "judicial factfinding on intricate licensing questions" because it would "undermine the Secretary's authority if judges and juries in individual criminal

proceedings were permitted to reverse licensing determinations." (App. 11a, 12a.) The majority thus interpreted this preclusion of judicial review with respect to administrative determinations concerning the *appropriateness* of listing goods on the CCL as also precluding judges and juries from determining in criminal proceedings the issue of whether a commodity had, in fact, been listed on the CCL, a finding that in turn automatically determines whether a license is legally required.

The majority, blurring the distinction between *whether* a commodity *should* be listed and whether it in fact *had* been listed, concluded that "when the Secretary has issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability." (App. 12a.) This supersession of the judge and jury by the Secretary in individual criminal prosecutions is, according to the majority, absolute -- "[r]ight or wrong, the trial court must accept [the Secretary's] determination as a matter of law" and "the government need not establish independently at trial . . . that the Spawrs' optical laser mirrors were included on the CCL and therefore subject to the licensing requirement." (*Id.*) The mere act of intentional export is all the government needed to prove, according to the majority, to obtain conviction of petitioners. (App. 13a.)

The majority justified this unprecedented delegation of plenary power to the Secretary in criminal cases on the grounds that to do otherwise would "convert the judicial system into a policy-making forum in which the judiciary possesses significantly less expertise and resources than the Secretary" which would, according to the majority, produce a "chaotic and potentially dangerous result." (App. 12a.)

The majority conceded that, because the judge at trial admitted the testimony of several expert witnesses called by the

government to adduce evidence to establish the optical laser mirrors had in fact been listed on the CCL, that "it is arguable that the district court originally considered this a triable issue. However, because we hold that the need for an export license had been established conclusively by the Secretary, it was harmless to place this issue before the jury." (App. 13a.)

Judge Pregerson dissented. He said that he could not agree with the statutory interpretation that provided the basis for the majority's decision -- "These provisions [that exempt the Secretary from APA judicial review of agency action] offer no support for the majority's position that in a criminal trial the factfinder is precluded from determining whether a commodity was in fact listed on the CCL at the time of the alleged criminal violation." (App. 14a.) Judge Pregerson also noted that the majority had misconstrued *United States* v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983), which, if read correctly, "makes clear the distinction between judicial review of (1) whether the Secretary actually did place a commodity on the CCL -- a question of fact -- and (2) whether the Secretary should have placed a commodity on the list -- a question of advisability." (App. 14a.) Finally, Judge Pregerson noted that "the majority's reading of the Act also suffers from constitutional infirmities." (App. 16a.) The constitutional infirmities that Judge Pregerson noted include the abridgement of petitioners' "Fifth Amendment right to due process and the Sixth Amendment guarantee of a criminal defendant's right to trial by jury [which] require[s] not only that the government prove every element of a criminal offense beyond a reasonable doubt, but also that each element be submitted to an impartial trier of fact." (*Id.*) Judge Pregerson concluded:

> Whether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is an essential element of the offenses allegedly committed by them. It was

> for the jury, not the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were in fact an item listed on the CCL.

(*Id.*)

While the majority considered but dismissed petitioners' showing that the prosecution suppressed exculpatory evidence in violation of *Brady*, the petitioners' showing of prosecutorial misconduct, and the claim of lack of effective counsel, it completely ignored and made no reference to petitioners' further showing that the prosecution, with the connivance of the chief prosecution witness, suppressed an official document of the Department of Commerce in which the Secretary, through the Office of Export Administration, had made an explicit finding prior to the export in question that the optical laser mirrors at issue had "an appropriate non-strategic end use" and that they were freely available abroad, *i.e.*, a finding of "non-COCOM foreign availability." (App. 43a.) The official Department of Commerce document explicitly found that "comparable laser mirrors are available from Mirror Techneque of Switzerland, a division of Laser Techneque of Switzerland." (*Id.*)

The significance of this suppressed document is that even if, *arguendo*, the optical laser mirrors had been listed on the CCL, the Secretary, by virtue of the finding of foreign availability, had a nondiscretionary duty under the Act to remove the optical laser mirrors from the CCL and was precluded as a matter of law from requiring a license to export them.

Congress, in section 2403(b)(2) of the EAA, commanded that whenever there is a finding by the Secretary that a commodity is available without restriction from sources outside the United States, the Secretary is subject to a

mandatory legal obligation to *remove* controls on the export of such commodity from the United States and is prohibited from requiring a license for export from the United States unless the President determines by formal report to the Congress that absence of controls would prove detrimental to the national security of the United States. (App. 29a.) This contention was completely ignored by the court of appeals.

Petitioners sought rehearing with suggestion for rehearing *en banc*. That petition was denied. (App. 27a.)

REASONS FOR GRANTING THE WRIT

The law has become confused and conflicting regarding the prosecution's burden of proof in a criminal proceeding alleging violation of the Export Administration Act, a major law regulating important aspects of the international trade of the United States and which thereby impacts the economy of the United States, its foreign policy and national security.[2]

In this case, a divided panel of the court of appeals has affirmed a judgment of the district court in which the Secretary of Commerce, not the finder of fact -- be it judge or, as in this case, the jury -- would be vested with the power to decide the guilt-determinative issue in criminal prosecutions under the

2 Interpretation of the EAA to vest plenary power in the Secretary of Commerce to determine conclusively and after the fact that an exported commodity was listed on the CCL and required a license would produce a system in which no exporter would dare incur the risk of exporting any commodity without first obtaining a license. This would overload the licensing system process and produce inordinate delay in the export trade of the United States.

EAA, *i.e.*, whether a commodity has in fact been listed on the CCL and therefore requires an export license. This conclusive determination would be irrebuttable. The majority specifically justified the vesting of this absolute power in the Secretary because "the judiciary possesses significantly less expertise and resources than the Secretary." (App. 12a.) The majority concluded, without supporting analysis, that under such a special subsystem of criminal law, in its view, "the Spawrs are not denied due process or the right to a jury trial by deference to the Secretary's determination." (*Id.*)

Judge Pregerson, dissenting, noted that a decision by a district court in the First Circuit, *United States* v. *Moller-Butcher,* 560 F. Supp. 550 (D. Mass. 1983), makes clear that although the "finality clause" of the EAA excludes certain acts of the Secretary from APA's judicial review provisions, it in fact simply "goes to whether the Secretary 'has the ultimate authority to decide which goods are included on the list and how they are classified' not whether the goods were in fact on the CCL." (App. 15a. (quoting *Moller-Butcher*, 560 F. Supp. at 552)) That decision thus conflicts with the decision by the majority in the instant case.

A decision by the Court of Appeals for the Eighth Circuit also squarely conflicts with the majority's decision in this case. In *United States* v. *Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987), the court described the essential elements of the crime under the EAA and the government's burden of proof in a criminal proceeding under the EAA:

> [T]he Government needs to prove . . . that the item exported appears on the . . . Commodity Control List . . . that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without an appropriate license.

The court in *Gregg* interpreted Judge Zobel's decision in *Moller-Butcher* in the same way as did Judge Pregerson, *i.e.*, that only the executive department's exercise of discretion as to *whether* a commodity should be listed on the CCL is precluded from judicial review.

In another recent decision, *United States* v. *Mandel*, 696 F. Supp. 505 (E.D. Cal. 1988), the court construed the EAA to require the Secretary to make a negative foreign availability determination before a commodity may be lawfully listed on the CCL and export controls imposed. Based on this interpretation, the court in *Mandel* granted a motion to compel the Secretary to produce documents to verify whether the Secretary had made the threshold determinaton required by section 2403 of the Act "*before* export controls are imposed." *Id.* at 508 (emphasis in the original). The court noted that preclusion of judicial review by the "finality clause" of the Act did not extend to decisions made under sections 2403 and 2404 "which command that items not be listed unless the criteria contained therein are met." *Id.* at 510. Moreover, the court noted that an indictment for failure to obtain a license before exporting a commodity that is in fact listed on the CCL "implicitly alleges that the Secretary's placement of the items on the CCL complied with the requirements of sections 2403 and 2404." *Id.*, at 508 n.13. This decision also conflicts with the decision by the majority in the instant case and goes further in limiting the scope of preclusion of judicial review compared to *Moller-Butcher* and *Gregg*.

The Court of Appeals for the District of Columbia Circuit, in a decision overruling the conviction under the EAA of an exporter held, "that notwithstanding a statutory provision that precludes judicial review of most enforcement decisions under this export law, Congress did not withdraw from the

courts the power or obligation to enforce the procedural safeguard that was flouted here." *Dart* v. *United States*, 848 F.2d 217, 219 (1988). In *Dart*, which involved imposition of civil sanctions rather than the far more serious criminal sanctions imposed upon petitioners in this case, the court held the Secretary's action was subject to judicial review to determine whether it violated either the EAA or the fifth amendment. *Id.* This interpretation of the scope of the EAA's preclusion of judicial review of the Secretary's actions involves yet another conflicting interpretation of the EAA.

Given the importance of the issue, and given these disparate and conflicting interpretations of the EAA by courts in four circuits, this Court should review and resolve these conflicts in this case.

The issue raised in this case is not only one of first impression and major public importance requiring clarification to remove the conflicts shown in the above decisions, but the majority in this case also rendered a decision which squarely conflicts with two long-settled doctrines established by this Court.

First, this Court has repeatedly enforced the prudential rule that courts must adopt statutory interpretations which avoid constitutional problems. *See, Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering*, 467 U.S. 138, 157-58 (1984), and cases cited therein. Judge Pregerson, in his dissenting opinion, pointed out major "constitutional infirmities" that would result from the interpretation of the EAA adopted by the majority. These constitutional infirmities include violation of this Court's holding in *In re Winship*, 397 U.S. 358, 364 (1970):

> [L]est there remain any doubt about the constitutional stature of the reasonable-doubt

> standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime of which he is charged;

and this Court's pronouncement in *Sandstrom* v. *Montana*, that a conclusive presumption conflicts with the overriding presumption of innocence and would invade the factfinding function assigned solely to the jury in a criminal case. 442 U.S. 510, 523 (1979) (citing *Morissette* v. *United States*, 342 U.S. 246 (1952); *United States* v. *United States Gypsum Co.*, 438 U.S. 442 (1978)).

There is a second conflict between the majority's decision in the instant case with doctrine established by this Court. The majority's decision is based upon its interpretation of section 2407 of the EAA as precluding *all* judicial review of the acts of the Secretary, including the issue in a criminal prosecution of whether the Secretary has acted to list the mirrors on the CCL. This interpretation conflicts with the doctrine enunciated in *Estep* v. *United States*, 327 U.S. 114, 120-22 (1946), that a statutory provision vesting in an administrative agency (the draft board) "final" authority to classify persons for military service shall not be construed to deny the power of federal courts in criminal prosecutions to determine whether the board acted within its jurisdiction when it classified petitioner to be eligible for military service. The Court rejected an interpretation of the finality clause as barring judicial review of the lawfulness of the classification decision stating, "[w]e are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the accused." *Id.* at 122. This Court has consistently rejected attempts in criminal prosecutions to insulate administrative

decisions from judicial review when that decision constitutes one of the elements of the alleged crime.

This principle has been applied in immigration cases in which Congress made deportation orders "final" and not subject to judicial review. This Court, relying *inter alia* on *Estep*, recently held, "the result of an administrative proceeding may not be used as a conclusive element of a criminal offense where the judicial review . . . has effectively been denied." *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987).

The depriviation of due process in the instant case would be more flagrant than those which this Court condemned in *Estep* and *Mendoza-Lopez*. Here the petitioners were subjected in a criminal trial to a conclusive presumption that the Secretary had acted to list the mirrors on the CCL and were barred from submitting as a defense that the Secretary had not acted, that the mirrors were not listed on the CCL, and an export license was not required before the mirrors could be lawfully exported.

I. THE STATUTORY QUESTION

At the time of the alleged offense, the EAA contained a single provision, section 2407, which exempted the Secretary with respect to "functions exercised under the Act" from the judicial review provisions of the Administrative Procedure Act. The majority in this case has interpreted this "finality clause" as precluding the trier of fact in an individual criminal proceeding, be it the judge or, as in this case, the jury, from independently determining whether the commodity in question was listed on the CCL at the time it was exported without a license.

According to the majority's interpretation of the "finality clause," once the Secretary asserts that the commodity is in fact on the CCL, the issue of "whether the Spawrs' mirrors were included on the CCL was not a triable issue." (App. 11a.) Under the majority's interpretation of the EAA, once the Secretary asserts the commodity was on the CCL at the time of export,

> [r]ight, or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that the Spawrs' mirrors were included on the CCL and therefore subject to the licensing requirement.

(App.12a.)

By such logic, the majority would amplify the limited preclusion of judicial review provided by section 2407 into a grant of authority by Congress to the Secretary to control, "right or wrong," the outcome of criminal prosecutions because "the trial court must accept this determination as a matter of law." (*Id.*) This interpretation is unsupported by the language of the statute and, as noted later, violates petitioners' constitutional rights.

The majority's statutory interpretation conflicts with this Court's decisions concerning the effect to be given to "finality clauses" when interpreting statutes. Section 2407 by its terms exempts the Secretary only from the judicial review provided by Section 704 of the APA, 5 U.S.C. § 704 (1982), review which is limited to *agency* action. At trial the petitioners were not challenging the *appropriateness* of the Secretary's listing the mirrors on the CCL, "an agency action," but, as Judge Pregerson noted, they were challenging ". . . whether their

product meets the description of an item previously placed on the CCL by the Secretary." (App. 14a.) This description is set forth in regulations promulgated by the Department of Commerce under authority granted by the EAA. The prosecution called three expert witnesses to prove that the mirrors *did* fit the "description of an item previously placed on the CCL by the Secretary." (*Id.*) The prosecutor also suppressed the evidence from two expert witnesses who, when interviewed prior to the trial, told him that the optical laser mirrors did *not* fit the description of any item on the CCL. One of these experts had participated in the drafting of the pertinent regulations governing what lasers and laser components shall be listed on the CCL. (*See* declaration of Alan E. Hill, App. 44a-46a.)

The issue whether the Secretary had listed the optical laser mirrors on the CCL was thus not an attempt to obtain judicial review of the appropriateness of an agency action under section 704 of the APA, but was instead an attempt to determine whether, in a criminal trial, the Secretary had ever acted at all with respect to listing the optical laser mirrors on the CCL.

The majority, by reading section 2407 not only to preclude judicial review of agency decisions under the APA, but to preclude the jury in a criminal proceeding from deciding a disputed issue of fact that is an element of the crime, squarely conflicts with this Court's established rule as to how finality clauses shall be construed. Instead of construing section 2407 narrowly as this Court requires, the majority would interpret it in an expansive fashion that would abrogate trial by jury in criminal proceedings brought under the EAA.

This Court has invariably rejected attempts in criminal prosecutions to insulate administrative decisions from judicial

review when that decision constitutes one of the elements of the alleged crime. In *Estep* v. *United States*, this Court refused to construe a finality clause in the Selective Training and Service Act to bar inquiry in a criminal trial into whether the board's classification decision "violated the rules and regulations which define their jurisdiction." 327 U.S. at 121. The board's classification of petitioner as eligible for military service was an element of the crime of refusing to serve in the military forces. Thus, the classification of Estep as eligible for military service was guilt-determinative. The Court held, "[w]e cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the board 'final' as to provide that a citizen of his country should go to jail for not obeying an unlawful order of an administrative agency." *Id.* at 122.

Similarly, this Court in *United States* v. *Mendoza-Lopez*, refused to construe a finality clause in the Immigration and Naturalization Act as barring judicial review of an administrative determination that constituted an element of the alleged offense in a criminal proceeding:

> Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding.

481 U.S. at 837-38 (*citing Estep* v. *United States*, 327 U.S. 114, 121-22 (1946); *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); *McKart v. United States*, 395 U.S. 185, 196-97 (1969)).

A fortiori, section 2407 of the EAA cannot be read in this case to preclude determination by the jury of whether or not

the Secretary in fact performed an act, the listing on the CCL, which is an essential element of the crime. Unless the commodity was in fact listed on the CCL, there was no requirement for a license before the commodity can be lawfully exported and therefore no crime was committed.

II. THE CONSTITUTIONAL QUESTIONS

The effect of the majority's decision is to abridge petitioners' constitutional rights at two levels. On one level, the majority condones the suppression of exculpatory evidence, prosecutorial misconduct and the lack of effective counsel. The rationale for condoning this misconduct as not being material or prejudicial is, according to the majority, that the guilt-determinative issue of whether the mirrors were in fact listed on the CCL was not before the court or jury. The majority reads the EAA to empower the Secretary to impose a conclusive presumption of guilt once petitioners stipulated they had knowingly exported the optical laser mirrors without a license.

Petitioners were not prejudiced by the suppression of exculpatory evidence, prosecutorial misconduct, and ineffective counsel, according to the majority, because petitioners were not entitled to challenge this conclusive presumption, and the judge and jury play no role in deciding whether the Secretary had in fact placed the optical laser mirrors on the CCL.

The majority explicitly based its decision that the Secretary, not the judge or jury, has plenary power to make this conclusive presumption upon the supposition that "the judiciary possess significantly less expertise and resources than the Secretary." (App. 12a.) This view conflicts with the holding of this Court concerning the competence of juries:

> [T]he most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Duncan v. *Louisiana* , 391 U.S. 145, 157 (1968).

There can be do doubt that the majority's reading of the EAA produces direct conflict with the sixth amendment which commands that in *all* criminal prosecutions, the accused *shall* enjoy the right to trial by an impartial jury and have effective assistance of counsel for his defense.

This Court has repeatedly asserted this right as mandatory and unqualified:

> The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . The deep commitment of the nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause . . . .

Id. at 156. *See also Apodaca* v. *Oregon*, 406 U.S. 404 (1972); *Williams* v. *Florida*, 399 U.S. 78 (1970); *Singer* v. *United States*, 380 U.S. 24 (1965).

The majority based its decision upon the erroneous conclusion that the issue of whether the mirrors had been listed on the CCL "was not an element of the charged offense" and thus the petitioners were "not denied due process or the right to a jury trial by deference to the Secretary's determination." (App. 12a.) Yet the statute makes it clear that listing on the CCL is a condition precedent to the requirement for an export license. The dissent noted:

> [It] does not follow that at a criminal trial the Secretary's determination that a commodity has been placed on the CCL must, as a matter of law, be accepted by the jury. Placing this question before the jury does not challenge the *advisability* of the Secretary's initial decision to list a commodity on the CCL. Therefore, requiring the government to prove at a criminal trial that the Spawrs' laser mirror was on the CCL at the relevant time would not "undermine the Secretary's authority" because such a requirement in no way challenges the Secretary's initial decision to place commodities on the CCL and to issue or refuse to issue licenses accordingly.

(App.15a. (emphasis in original))

The sixth amendment does not authorize Congress to create exceptions and devise a special system of criminal law to enforce export law in which both judge and jury are bypassed. This Court has repeatedly interpreted the Constitution to require the government to present proof to an independent and unbiased trier of fact which establishes beyond reasonable doubt *all* of the elements that constitute the alleged crime. This Court, in *In re Winship*, held that, "Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." 397 U.S. at 364. The Court went on to emphasize:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged.

Id. (emphasis added).

Acting on this principle, this Court has rejected interpretations of statutes which would shift the burden of proof from the government to the accused, *Mulaney* v. *Wilbur*, 421 U.S. 684 (1975), and has stressed that:

> Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt . . . .

Speiser v. *Randall*, 357 U.S. 513, 525-26 (1958).[3]

In *Sandstrom* v. *Montana*, 442 U.S. 510 (1929), this Court overturned a murder conviction on the grounds that the trial judge, by his phrasing of the jury instruction, had presumed intent and had placed the burden on the accused to rebut that presumption. The Court condemned the trial court's action "to suppose to be true without proof" a key issue in the

---

3 Petitioner, Walter Spawr, was imprisoned for six months of a ten year sentence and placed on probation for five years. The Corporation was fined $100,000 and placed on probation for five years. Frances Spawr was given a five year suspended sentence and placed on probation for five years. The Spawrs continue to be denied export privileges until 1992 pursuant to a civil sanction, imposed by the Secretary of Commerce without benefit of hearing, based entirely on their criminal conviction .

case, *id.* at 517, relying upon *Winship,* and *Morissette* v. *United States*, 342 U.S. 246 (1952), in reaching its conclusion that:

> [p]resumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would 'invade [the] factfinding function' which in a criminal case the law assigns *solely to the jury.*

Sandstrom, 442 U.S. at 523 (citations omitted) (emphasis added).

The instant case presents an even more aggravated denial of petitioners' rights. The majority would make the guilt-determinative presumption conclusive and irrebutable.

The dissent was clearly right when it concluded:

> [W]hether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is an essential element of the offenses allegedly committed by them. It was then for the jury, not the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were in fact an item listed on the CCL.

(App. 16a.)

III. THE SECRETARY OF COMMERCE COULD NOT LAWFULLY HAVE LISTED THE MIRRORS ON THE CCL.

The EAA empowers the Secretary to impose export controls for reasons of national security, foreign policy, or domestic short supply. 50 U.S.C. app. §§ 2402(2), (10),

2404-2406. These controls are implemented by licensing requirements for commodities which meet the criteria set forth in the Act. 50 U.S.C app. § 2403(a). The Act contains criteria which govern the Secretary's imposition of export controls which seek to balance the inherently conflicting interest of controlling strategic technology for security reasons on the one hand with the economic needs of the United States for foreign trade on the other.

Section 2403(b)(2) of the EAA of 1969, as amended in 1972 by Pub. L. No. 92-412, the law in effect at the date of export, provided:

> [T]he President *shall remove* unilateral export controls on the export from the United States of articles, materials, or supplies, including technical data or other information, *which he determines to be available without restriction from sources outside the United* States . . . except that any such control may remain in effect if the President determines that adequate evidence has been presented to him demonstrating the absence of control would prove detrimental to the national security of the United States.

(App. 29a. (emphasis added))

When, in the period after September, 1986, present counsel for the petitioners reviewed the trial transcript and the manner in which the trial was conducted, they discovered that prior counsel for petitioners had not deposed any of the prosecution witnesses nor attempted to obtain discovery with respect to the alleged listing of the mirrors on the CCL. Specifically, counsel for the defense had not deposed or submitted interrogatories to John Kenneth Boidock, the key prosecution witness from the Office of Export Administration,

who was Director of the Electronic Equipment Division during the relevant time in 1976 and 1977. In an effort long after the trial to repair these deficiencies in the preparation for trial, present counsel filed a Freedom of Information Act request to discover the facts pertaining, *inter alia*, to the alleged listing of the mirrors. In a letter dated July 2, 1987, the Department of Commerce informed counsel for petitioners that pertinent material had been located in the Office of Export Enforcement, that the documents would be processed for declassification, and would be made available when the declassification process was completed. (App. 40a-41a.) The declassification process was completed on July 31, 1987, and the documents were turned over to counsel on August 7, 1987, subsequent to the release of the district court's order denying petitioners' motion for reconsideration.

One of these official documents of the Department of Commerce, which was signed by witness Boidock and approved by his superior, John W. Shephard, Division Director, Policy Planning Division, Office of Export Administration, disclosed that the mirrors in question had at the time of export "appropriate non-strategic end use, and . . . non-COCOM foreign availability." (App.43a.) This document spelled out that "comparable laser mirrors are available from Mirror Techneque of Switzerland, a division of Laser Techneque of Switzerland." (*Id.*) Thus, the mirrors were, within the terms of section 2403(b)(2), "available without restriction from sources outside the United States." And, because the mirrors had "appropriate non-strategic end use," it was clear that export of the mirrors would not "prove detrimental to the national security of the United States."

Witness Boidock, with the collusion of the prosecution, suppressed this document. The legal effect of this document was that even if the Secretary had at an earlier date listed the

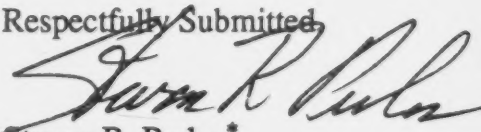
mirrors on the CCL, the Secretary could no longer lawfully require a license and had a non-discretionary duty to remove the mirrors from the CCL once the determination had been made that the mirrors were "available without restriction from sources outside the United State." (App. 29a.)

Conviction of Petitioners in these circumstances violates this Court's mandate that a citizen of this country should not go to jail "for not obeying an unlawful order of an administrative agency." *Estep* v. *United States*, 327 U.S. at 122. *See also*, *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1986). The suppression of this document by the prosecution was clearly material and prejudicial. On this ground alone, the conviction must be overturned.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully Submitted,



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APPENDICES

TABLE OF CONTENTS FOR APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit..... 1a

APPENDIX B

Order of the United States District Court for the Central District of California..... 17a

APPENDIX C

Opinion of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *en banc*..... 27a

APPENDIX D

Title 50, Appendix - War and National Defense §§ 2401 - 2413..... 28a

APPENDIX E

15 C.F.R. 399.1..... 32a

APPENDIX F

15 C.F.R. 399.2, Interpretation 29..... 33a

APPENDIX G

July 2, 1987 Letter from Daniel O. Hill of Department of Commerce..... 40a
OC Document No. 5653..... 42a

APPENDIX H

Declaration of Alan E. Hill, attaching 15 C.F.R. 399.1..... 44a

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

United States of America, Plaintiff-Appellee	)	No. 87-6272
	)	DC Nos.
v.	)	CR-80-0789-WMB
	)	and
Spawr Optical Research, Inc.	)	CR-85-3193-WMB
Walter J. Spawr, and	)	
Frances Spawr,	)	
Defendants-Appellants	)	OPINION
	)	

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge. Presiding

Argued and Submitted
March 7, 1988 - Pasadena, California

Filed December 29, 1988

Before: Harry Pregerson, Charles Wiggins
and Melvin Brunetti, Circuit Judges

Opinion by Judge Brunetti: Dissent by Judge Pregerson

OPINION

BRUNETTI, Circuit Judge:

BACKGROUND

In the early 1970's, Walter Spawr, an optics expert, invented a superior process for polishing laser mirrors. By 1975, Walter and his wife Frances, through their corporation, Spawr Optical Research, Inc. (collectively "the Spawrs"), were marketing their laser mirrors nationally and exploring international markets.

In January 1976, the Spawrs accepted an order from a purchasing agency of the Soviet Government. They began filling the order in June of that year by delivering some of the mirrors to their agent in this country, who then departed for West Germany. The Spawrs shipped the balance of the order to the agent in West Germany in July. The agent then forwarded the entire order to Moscow. The Spawrs never attempted to obtain an export license for this shipment of mirrors.

In April 1976, the Spawrs received a second Soviet order. Walter decided to seek an export license for a portion of this second order. He filed a license application with the Commerce Department in May, identifying his agent in West Germany as the end-user of the mirrors. On October 7, 1976, the Secretary of Commerce ("Secretary") denied the application, having determined that the Spawrs' mirrors were included on the Commodity Control List ("CCL")[1] , and that

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[1] The CCL, established by the Secretary pursuant to 50 App. U.S.C. § 2403(b) and § 2404(c), "specifies the goods subject to export controls and the group of countries to which exports of certain products are restricted. By the use of code numbers and letters following products on the list, an exporter can determine whether a particular shipment of goods requires a validated license or not." *United States* v. *Moller-Butcher*, 560 F. Supp. 550, 552 (D. Mass. 1983); see 15 C.F.R. § 399.1.

they had "significant strategic applications" posing a potential threat to national security.

In November, because of their inability to obtain an export license, the Spawrs canceled the second Soviet order. However, in February 1977, they shipped mirrors to a freight forwarder in Switzerland. Their agent then relabeled the boxes containing the mirrors and forwarded the shipment to Moscow.

In 1980, the Spawrs were indicted for misrepresenting shipment values in declarations submitted to the United States Customs Service, a violation of 18 U.S.C. § 1001 (Counts 1-6); conspiracy to export laser mirrors without a required license, a violation of 18 U.S.C. § 371 (Count 10); and exporting laser mirrors without a required license, with knowledge that they would be transshipped to the Soviet Union, a violation of export administration regulations (Counts 7-9, 11-14).[2] A fifteenth count was dismissed on the court's motion.

After a jury trial, the corporation was convicted on all charges (Counts 1-14), Walter was convicted on the conspiracy and 1977 exporting charges (Counts 10-14), and Frances was convicted on the misrepresentation, conspiracy, and 1977

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[2] Counts 7-5 relate to the 1976 exports filling the first Soviet order. They charge violation of 15 C.F.R. § 371.2, 372.l(b), 387.6 and then § 6(b) of the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841, 844 ("1969 Act") (formerly 50 App. U.S.C. § 2405(b)). Counts 11-14 relate to the 1977 exports filling the second Soviet order, which occurred after the 1969 Act had expired and before it was reenacted by Pub. L. No. 95-52, 91 Stat. 235 (1977) (superseded by the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 533 ("1979 Act") (codified as amended at 50 App. U.S.C. § 2401 et seq.)). They charge, in addition to the aforementioned regulations and 15 C.F.R. § 387.1(a), violation of Exec. Order No. 11940, 3 C.F.R. § 150 (1976) (revoked by Exec. Order No. 12002, 3 C.F.R. § 133 (1977), *reprinted in* note to 50 App. U.S.C. § 2403, and § 5(b) of the Trading with the Enemy Act, ch. 106, 40 Stat. 411, 4, 5 (1918) (codified as amended at 50 App. U.S.C. § 5(b)), which maintained the 1969 Act regulations in force until the 1969 Act could be reenacted.

exporting charges (Counts 1-6, 10-14).[3] The Spawrs appealed their conviction on four grounds: that the export regulations relied on by the government were defunct; that government misconduct prejudiced their defense; that the trial court erred by admitting co-conspirator statements lacking a proper evidentiary foundation; and that the evidence was insufficient to support their convictions. This court affirmed their convictions in *United States v. Spawr Optical Research, Inc.* 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

In 1985, the Spawrs collaterally attacked their convictions by filing a petition under 28 U.S.C. § 2255 requesting the district court to set aside their sentences on ten new grounds not raised at trial or on appeal. The district court denied its petition in its unpublished order filed October 9, 1986, because the Spawrs had not demonstrated that they had cause for failing to raise their issues at trial or on appeal, or that they had been prejudiced by the alleged trial defects.

The Spawrs then moved for reconsideration of the district court's order denying the § 2255 petition. They moved the district court to reconsider on two of the grounds relied on in the petition: that they had ineffective assistance of counsel, and that the prosecution withheld exonerating evidence in violation of *Brady*. The Spawrs also filed an additional motion alleging another instance of prosecutorial misconduct -- that the prosecution intentionally provided the court with the wrong CCL. The district court denied the Spawrs' motion in its

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[3]The trial court sentenced the corporation to fines totalling $100,000, and placed the corporation on probation for five years. Frances was given five year suspended sentences on Counts 1-6 and 10-14, and placed on probation for a period of five years. Her sentences ran concurrently. Walter was given a five year sentence on Count 10, and ten year sentences on Counts 11-14. His sentences also ran concurrently. Walter was to serve the first six months of his sentence in custody, and the remainder of the sentence was suspended. He was put on probation for a period of five years after the expiration of his six months in custody.

unpublished order, filed July 21, 1987, for essentially the same reasons as its earlier denial.[4]

On appeal, the Spawrs renew the three contentions of trial error raised in their earlier motion to reconsider -- *Brady* violations, the prosecution's knowing production of misleading evidence, and ineffective assistance of counsel. The government addresses the Spawrs' arguments and further contends that this appeal should be dismissed for lack of jurisdiction, for undue delay in filing § 2255 motion, and for failure to assert claims at trial or on direct appeal. The district court's denial of the Spawrs' § 2255 motion is reviewed *de novo*. *See United States v. Quan*, 789 F.2d 711, 713 (9th Cir. 1986).

JURISDICTION

The government contends that the district court lacked jurisdiction over the Spawrs' § 2255 motion because the Spawrs are no longer in custody. We disagree.

The district court's jurisdiction over this motion is measured at the time of filing. So long as the Spawrs were in custody at that time, jurisdiction is present. *See 16 Federal Procedure* § 41:15 at 328-29 (1983). The district court has stated that the Spawrs were serving five year probationary terms when they filed their §2255 motion. A probationary term is sufficient custody to confer jurisdiction. *See Wright v. United States*, 732 F. 2d 1048, 1050 n. 1 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

Apparently the government, believing that the Spawrs were released from probation after filing, is actually making a

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[4]Most of this background discussion is drawn from the district court's unpublished Order Denying Section 2255 Petition, at p. 1 n. 1; the district court's Order Denying Defendants' Motion for Reconsideration of Order Denying Section 2255 Motion, at pp. 1-3; and this court's opinion on direct appeal, *see Spawr*, 685 F.2d at 1078-80 & nn. 1-6.

mootness argument. The district court rejected this contention, relying primarily on Supreme Court authority, *Lane v. Williams*, 455 U.S. 624 (1982); *Sibron v. New York*, 392 U.S. 40 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); and authority from this court, *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *Courtney v. United States*, 486 F.2d 1108 (9th Cir. 1973). We agree with the district court that this motion is not moot.

In *Carafas*, the court held that, so long as the adverse consequences of a criminal conviction remain, a petition for a writ of habeas corpus is not moot, even though the petitioner's custody has expired since filing. 391 U.S. at 236-38. Shortly thereafter, in *Sibron*, the Court reached a similar result. 392 U.S. at 50-58. In *Lane*, the Court found the petition at issue to be moot. However, it did so on the ground that the petitioner, who was no longer in custody, had challenged only the sentence. The Court, citing *Carafas* and *Sibron*, emphasized that the petitioner had challenged the conviction itself. 455 U.S. at 630-33.[5]

[1] The Spawrs have raised a number of challenges to their convictions (e.g. ineffective assistance of counsel). Thus, the distinction identified in *Lane* is not an obstacle to the remedy sought in this case. Moreover, it is evident that collateral consequences of the Spawrs' convictions still remain. For example, as the district court and the Spawrs have noted, the Spawrs are unable to receive government contracts until 1991. It may also be true that direct consequences of the convictions remain -- the Spawrs claim that their corporation has not completed payment of its fine, and that their probation terms have not expired (the government has stated otherwise).

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[5]These Supreme Court decisions involved petitions for habeas corpus and not § 2255 motions. Nevertheless, this court's decisions in *Hearst*, 638 F.2d at 1192 n. 1, and *Courtney*, 486 F.2d at 1109 n. 1, clearly establish that *Carafas* and its progeny apply with equal force to § 2255 motions.

As a result, this § 2255 motion is still viable under *Carafas* and *Sibron.*

As a final matter, the government requests this court to dismiss the motion because of the Spawrs' delay in filing. Rule 9 of the Rules Governing § 2255 Proceedings provides:

> *(a) Delayed motions.* A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

However, it should be emphasized that the government must first make a show of prejudice. *See 16 Federal Procedure* § 41:507 at 594 (1983). Beyond its request for dismissal due to delay, the government makes no showing or prejudice. Therefore, its request is denied.

PROCEDURAL DEFAULT

The government also contends that the Spawrs' § 2255 motion should be dismissed because the issues presented were not raised at trial or on direct appeal. It maintains that under *United States v. Frady*, 456 U.S. 152, 167 (1982), the Spawrs must show "cause" to excuse their procedural default and "actual prejudice" from the alleged trial errors. The government claims that the Spawrs have done neither.

In *Sunal v. Large* , 332 U.S. 174 (1947), the Supreme Court capsulated the law concerning the availability of habeas relief in the face of such procedural defaults. The Court first stated the general rule that "the writ of habeas corpus will not

be allowed to do service for an appeal." *Id.* at 178. The Court then acknowledged an exception for errors of constitutional magnitude as opposed to mere errors of law and procedure. *Id.* at 178-79. However, the Court limited this "constitutional" exception to exceptional circumstances for which no reasonable alternative to habeas existed for their correction. *Id* at 179-80, 183-84.

Years after § 2255 was enacted, the Court decided *Kaufman v. United States*, 394 U.S. 217 (1969). In *Kaufman*, the Court generally reaffirmed the principles set out in *Sunal*. But it stated that constitutional claims should not be denied solely because they should have been raised on appeal. *Id.* at 223-24. Whereas the Court imposed no requirement on petitioners to show cause and prejudice, it implied that constitutional claims should not be decided when direct appeal procedures were deliberately bypassed. *Id.* at 220 n. 3.

In *Davis v. United States*, 411 U.S. 233 (1973), the Court once again affirmed the foregoing principles with one exception. It distinguished *Kaufman* and carved out a class of constitutional claims that would not be so readily decided initially on a § 2255 motion. These claims are those that run afoul of express waiver provisions such as Fed. R. of Crim. P. 12(b)(2)(objections to indictment waived unless raised by motion before trial). The *Davis* court restricted the judicial discretion to be exercised in these § 2255 cases by requiring the petitioner to show "cause and prejudice." 411 U.S. at 243-245.

This same standard was applied to a claim that ran afoul of Fed. R. of Crim. P. 30 (objections to jury charge waived unless raised before jury retires). See *Frady*, 456 U.S. at 167-68. In reaffirming *Davis*, the *Frady* Court did not expressly overrule *Kaufman* (nor did it have reason to). The Court has not modified its position further.

[2] In this case, each of the Spawrs' claims is constitutionally based, either on the Fifth or Sixth Amendment.

Thus, the general rule that claims cannot be raised initially in a § 2255 motion is inapplicable. The question becomes whether these claims fall under the "cause and prejudice" rule of *Davis* and *Frady*.

[3] We find that we need not resolve this question. Assuming that "cause and prejudice" are not threshold barriers to the Spawrs' motion by virtue of *Davis* and *Frady*, showings of materiality or prejudice are nonetheless required before relief can be granted on claims of prosecutorial misconduct and ineffective assistance of counsel.[6] As we discuss below, the Spawrs are unable to meet even the slightest burden of showing the materiality of the alleged trial defects, or the prejudice caused thereby, because the issue to which each of their claims relate was not a disputable issue in their criminal trial.

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[6]In order to establish a *Brady* violation, the defense must show that the exculpatory evidence suppressed by the government was material; that is, "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 657, 682 (1985) (plurality). Before the prosecution's knowing proffer of misleading evidence will result in a new trial, the materiality of that evidence must also be established. "A new trial is in order if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." *United States v. Polizz*, 801 F.2d 1543, 1550 (9th Cir. 1986). And prejudice is a necessary element of a claim of ineffective assistance of counsel. In most cases, the prejudice requirement can only be met if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The *Strickland* standard for prejudice has been considered to impose virtually the same burden on the defense as the standard for materiality in *Brady* claims. *See Bagley*, 473 U.S. at 682. The burden on the defense in claims of knowing production of false evidence, however, is less imposing, akin to the harmless error standard which requires the government to show immateriality. *See Bagley*, 473 U.S. at 679-80 n. 5.

MATERIALITY

[4] The first of the Spawrs' claims is based on the government's duty to disclose to the defense material of an exculpatory nature. *See Brady*, 373 U.S. at 87. The Spawrs contend that the government knowingly suppressed testimony of a laser mirror expert and an Air Force Colonel. They argue that had this testimony not been suppressed, it "would have established that the mirrors exported by the Spawrs were not on the Commodity Control List and did not require an export license."

The second claim is based on another allegation of prosecutorial misconduct. The Spawrs assert that during the course of the trial, the government knowingly provided the court with an incorrect CCL. Had the correct version been provided, they maintain, the court would have instructed the jury differently as to the presence of the Spawrs' mirrors on the CCL.

The third and last claim alleges ineffective assistance of counsel. The record clearly reveals that the Spawrs' entire dissatisfaction with counsel relates to the licensing issue. The Spawrs argue that counsel failed to secure relevant expert testimony on the question of whether their mirrors were included on the CCL, and that counsel failed to detect the recurring instances of prosecutorial misconduct.

[5] These three claims relate entirely to a single issue: whether the Spawrs' mirrors were included on the CCL and therefore required an export license. The claims can only be material if this licensing issue was in controversy during trial. If the issue was not in controversy, the Spawrs would hardly be entitled to relief based on the prosecutor's misconduct regarding evidence probative of that issue or defense counsel's failure to detect such misconduct.

In its denial of this § 2255 motion, the district court held that the Spawrs' claims were not material because the question of whether the Spawrs' mirrors were included on the CCL was not a triable issue. It stated that the executive branch, rather than a jury, is empowered to determine which commodities require export licenses; and in this case, the Secretary had determined that the Spawrs' mirrors were subject to the license requirement. The Spawrs now vigorously contest the district court's holding.

The Spawrs do not challenge the conclusion reached in *Moller* v. *Butcher*, 560 F. Supp. at 552-54, that the Secretary has the final word, in the setting of a criminal trial, in determining which items *should* be included on the CCL at any given time. Rather, they challenge the district court's decision to defer to the Secretary's determination that their mirrors *were* included on the CCL when they applied for an export license. They maintain that this latter determination impacts on an element of the charged offenses; and therefore, due process and the right to a trial by jury preclude deference to the Secretary. As a consequence, the Spawrs argue that a jury (or perhaps a judge) should be permitted to evaluate the evidence and reach a conclusion contrary to that of the Secretary. We disagree.

It is beyond dispute that the export of commodities is a major component in the economic condition of the United States. In addition, the export of certain commodities may have a significant impact on United States' foreign policy and national security. See 50 App. U.S.C. § 2402. The enactment of the 1969 Act and later the 1979 Act, as well as the promulgation thereunder of a complex scheme of regulations, is a testament to the important and sensitive nature of the export function.

In this context, we cannot construe the 1969 Act or its regulations to accommodate judicial factfinding on intricate licensing questions. Congress had designated the Secretary as the coordinating official in the area of export administration. It

would severely undermine the Secretary's authority if judges and juries in individual criminal proceedings were permitted to reverse licensing determinations. And it would convert the judicial system into a policy-making forum, one in which the judiciary possess significantly less expertise and resources than the Secretary. Congress did not intend this chaotic and potentially dangerous result.

This is evident in Congress' decision to exempt the Secretary's determinations under the 1969 Act from the judicial review provisions of the Administration Procedure Act. *See* § 8, 1969 Act (current version codified at 50 App. U.S.C. § 2412(a)); *see* also § 13(e), 1979 Act (added by amendment, Pub. L. No. 99-64, § 114, 99 Stat. 120, 151-52 (1985), codified at 50 App. U.S.C. § 2413(e)) ("The Secretary's written [license denial] shall be final and is not subject to judicial review."). It is also evident in the language of the two statutory provisions which the exporting counts charged the Spawrs with violating. *See* Former 50 App. U.S.C. § 2405(b) (relative to the 1976 exports), and 50 App. U.S.C. § 5(b) (relative to the 1977 exports). These provisions make it a crime to violate not only the particular statute or its regulations, but also any license or order issued thereunder. Thus, when the Secretary has issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability.

[6] In this case, the Secretary has determined that the Spawrs' mirrors could not be exported without an export license. Right or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that the Spawrs' mirrors were included on the CCL and therefore subject to the licensing requirement. Because the licensing issue was not an element of the charged offenses, the Spawrs are not denied due process or the right to a jury trial by deference to the Secretary's

determination. Rather, given the Secretary's determination, the prosecution must prove only that the Spawrs exported their mirrors without the necessary license and with the appropriate mental state.

At trial, the district court admitted some government testimony and instructed the jury on matters relating to the licensing issue. It is therefore arguable that the district court originally considered this a triable issue. However, because we hold that the need for an export license had already been established conclusively by the Secretary, it was harmless to place this issue before the jury.

CONCLUSION

In the absence of any controversy surrounding this issue, the Spawrs' dependent claims of prosecutorial misconduct and ineffective assistance of counsel are immaterial and non-prejudicial.

Accordingly, the district court's judgment denying the Spawrs' § 2255 motion is affirmed.

AFFIRMED.

HARRY PREGERSON, Circuit Judge, dissenting:

I agree with the majority that the Secretary of Commerce's decision to place a commodity on the Commodity Control List ("CCL") is not subject to judicial review. I disagree, however, with the unwarranted conclusion that the majority draws from this initial proposition, to wit: that at a criminal trial the Secretary's factual determination that a commodity had been placed on the CCL is conclusive and thus is not a question for the jury to determine. The authorities cited

by the majority support the initial proposition, but not the conclusion drawn from it.

The majority cites two statutory grounds for its reading of the Act. First, Congress exempted the Secretary's decision to place a commodity on the CCL from the judicial review provisions of the Administrative Procedure Act ("APA"). *See* § 8, Export Administration Act of 1969, *reprinted* in U.S. CODE CONG. & ADMIN. NEWS 943 (current version codified at 50 App. U.S.C. § 2412(a)) (excluding the functions exercised under the Export Administration Act from the operation of the APA's judicial review provisions, 5 U.S.C. §§ 701-706). Section 704 of the APA provides for judicial review of *agency action*. The Spawrs are not challenging the Secretary's initial decision to place their commodity on the CCL. What the Spawrs are challenging at their criminal trial is whether their product meets the description of an item previously placed on the CCL by the Secretary.

Second, two of the statutory provisions under which the Spawrs are charged make it a crime to violate any license or order issued by the Secretary. *See* Former 50 App. U.S.C. § 2405(b) and 50 App. U.S.C. § 5(b). Again these provisions address actions by the Secretary (i.e., placing commodities on the CCL or issuing or refusing to issue an export license) occurring before an alleged criminal violation of the Act occurred. These provisions offer no support for the majority's position that in a criminal trial the factfinder is precluded from determining whether a commodity was in fact listed on the CCL at the time of the alleged criminal violation.

The majority's reliance on *United States* v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983) is similarly misplaced. The district court in *Moller-Butcher* makes clear the distinction between judicial review of (1) whether the Secretary actually did place a commodity on the CCL - a question of fact - and (2) whether the Secretary should have placed a commodity on the list - a questions of advisability:

> Defendants contend that the grand jury must allege and the government must prove not only that the particular goods that defendants are accused of exporting without a license are listed on the CCL, but also that they fall within the category of goods which make a significant contribution to another country.

Moller-Butcher, 560 F. Supp. at 552. In making this distinction, the district court in *Moller-Butcher*, contrary to the majority's position, appears to assume that the first question, whether particular commodities are on the CCL, is a question for the jury. In any event, the holding in *Moller-Butcher* goes to whether the Secretary "has the ultimate authority to decide which goods are included on the list and how they are classified," *id.*, and not whether the goods were in fact on the CCL.

The majority concludes that "when the Secretary *has* issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability." Majority opinion at page 15770 (emphasis added). Assuming arguendo that this conclusion is a correct reading of the Act, it still does not follow that at a criminal trial the Secretary's determination that a commodity had been placed on the CCL must, as a matter of law, be accepted by the jury. Placing this question before the jury does not challenge the *advisability* of the Secretary's initial decision to list a commodity on the CCL. Therefore, requiring the government to prove at a criminal trial that the Spawrs' laser mirror was on the CCL at the relevant time would not "undermine the Secretary's authority" because such a requirement in no way challenges the Secretary's initial decision to place commodities on the CCL and to issue or refuse to issue licenses accordingly.

In addition to its lack of support in the text of the Act, in its legislative history, and in the case law interpreting it, the majority's reading of the Act also suffers from constitutional infirmities. The Fifth Amendment right to due process and the Sixth Amendment guarantee of a criminal defendant's right to trial by jury require not only that the government prove every element of a criminal offense beyond a reasonable doubt but also that each element be submitted to an impartial trier of fact. *See In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also Sandstrom* v. *Montana* 442 U.S. 510, 521-22, 99 S. Ct. 2450, 2458 (1979) (conclusive presumption conflicts with the overriding presumption of innocence and would invade the factfinding function assigned solely to the jury in a criminal case) (citing *Morissette* v. *United States*, 342 U.S. 246 (1952), and *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978)). Whether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is an essential element of the offenses allegedly committed by them. It was for the jury, not the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were in fact an item listed on the CCL.

Accordingly, I respectfully dissent.

APPENDIX B

United States District Court
Central District of California

United States of America,	)
	) CV 85-3193-WMB
Plaintiff,	) CR 80-789-WMB
	)
v.	)
	) ORDER DENYING
Spawr Optical Research, Inc.,	) DEFENDANTS'
Walter J. Spawr and Frances	) MOTION FOR RE-
Spawr,	) CONSIDERATION
Defendants.	) OF ORDER
	) DENYING SECTION
	) 2255 MOTION
	)

I. FACTS

Walter and Frances Spawr, and their corporation, Spawr Optical Research, Inc. (the Spawrs) were convicted of exporting laser mirrors destined for the Soviet Union without obtaining the required validated export license. The Spawrs appealed their convictions on the basis of four grounds: that the export regulations relied on by the goverment were defunct; that government misconduct prejudiced their defense; that the trial court erred by admitting co-conspirator statements lacking a proper evidentiary foundation; and that the evidence was insufficient to support their convictions. The Ninth Circuit affirmed their convictions in *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (1982), *cert. denied*, 461 U.S. 905, 103 S. Ct. 1875 (1983).

The Spawrs collaterally attacked their convictions by filing a petition under 28 U.S.C. section 2255 requesting the Court to set aside their sentences on ten new grounds not raised at trial or on appeal. The Spawrs asserted that the indictment failed to charge a crime with respect to the exportation of laser mirrors, the Court imposed a sentence in excess of that provided by statute, the Court lacked jurisdiction, the jury instructions were improper, double jeopardy had been violated, the prosecution withheld exonerating evidence, the convictions were obtained by use of a coerced confession, the jury was unconstitutionally selected, they were deprived of their right to question witnesses, and they had ineffective assistance of counsel. The court denied the petition in its order filed October 9, 1986, because the Spawrs had not demonstrated that they had "cause" for failing to raise these issues at trial or on appeal, or that they had been prejudiced by their failure to do so.

The Spawrs now move for reconsideration of the Court's order denying the section 2255 petition. They move the Court to reconsider two of the grounds relied on in the petition: that they had ineffective assistance of counsel, and that the prosecution withheld exonerating evidence. The Spawrs also have filed an additional motion for leave to file a supplemental memorandum in support of the motion, alleging another instance of prosecutorial misconduct -- that the prosecution intentionally provided the Court with the wrong list of commodities prohibited from export.

The Court denies the motion to reconsider and its supplement on the merits.

II. DISCUSSION

Local Rule 7.16 sets forth three grounds for which a court may reconsider a motion: "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been

known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." The Rule states that "[n]o motion for reconsideration shall in any matter repeat any oral or written argument made in support of or in opposition to the original motion." Although not expressly stated, from their arguments it appears that the defendants request reconsideration under subsection (a) or (b). Giving the defendants the benefit of every doubt, the Court will assume that defendants have presented sufficient grounds to justify consideration of the merits of their instant motion.

In order to obtain collateral relief under section 2255 based on trial errors to which counsel made no contemporaneous objection, a convicted defendant must show "cause" for the double procedural default and "actual prejudice" resulting from the errors. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584 (1982).

A. Ineffective assistance of counsel -- the cause requirement

The Spawrs implicitly rely on the same argument the Court considered in its original order, that the ineffectiveness of their counsel constitutes "cause" for their failure to object to the alleged errors. The courts agree that constitutionally ineffective assistance of counsel constitutes cause, but they diverge as to whether some lesser level of attorney negligence will suffice in some circumstances. Compare *Tsirizotakis v. LeFevre*, 736 F.2d 57 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 216 (1984) (no "cause" shown where petitioner failed to show deprivation of Sixth Amendment right); with *Collins v. Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), *cert. denied*, 439 U.S. 1133,

99 S. Ct. 1057 (1979) (inadvertance of counsel may constitute "cause" for procedural default).

To show ineffective assistance of counsel, *Garrison v. McCarthy*, 653 F.2d 374 (9th Cir. 1981) holds that when counsel makes a tactical decision not to object to errors of the trial court, the convicted defendant must establish that his counsel's performance constituted a deprivation of his Sixth Amendment right. If instead the error is based on counsel's inadvertance or ignorance, "a lesser showing of incompetency of counsel should be sufficient for 'cause'." *Id.* at 378. However, the *Garrison* court did not address what lesser level of incompetence would be sufficient to constitute "cause" where counsel's failure to raise the issue in the original proceeding is unintentional.

To establish a Sixth Amendment deprivation, it must be shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). Counsel's conduct must fall below an objective standard of reasonableness. 466 U.S. at 688, 104 S. Ct. at 2064. Counsel's conduct must also be prejudicial, that is, it must be shown that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S. Ct. at 2068.

If counsel's errors were the result of inadvertence or ignorance, the Court must decide whether counsel's performance was so deficient as to justify raising these matters collaterally.

In either case, whether counsel's conduct is analyzed under the Sixth Amendment or the "inadvertence or ignorance" standard, the Court necessarily assesses the merits of the petition. If the challenge is meritless, no prejudice for the failure to raise it can result, and counsel's failure to do so, because of tactics, inadvertence or ignorance, cannot be viewed

as unreasonable or incompetent. If the challenge is meritorious, competent counsel would have made it, absent equally promising alternatives or countervailing considerations. The Court notes, as it did in the original order, that it is not enough to argue that the necessity of the petition itself demonstrates inadvertence or ignorance sufficient to constitute "cause." Whatever lesser degree of incompetence is necessary to constitute "cause" under the second standard, more must be shown than the mere necessity of the petition.

Defendants argue that their counsel's performance was incompetent at all points of the case -- pretrial, trial, and post-trial.

B. Failure to develop exculpatory expert testimony

Defendants first assert that they provided defense counsel Mr. William Dougherty with the names of twenty-four expert witnesses to obtain expert testimony that the device they exported was not on the Commodity Control List (List) of the Export Administration Act (Act) and had been freely exported since 1970. Defendants assert that a few days before trial, Dougherty falsely claimed that he had interviewed each of these experts and insisted that their testimony would not be helpful.

Second, defendants argue that their counsel interviewed only Dr. Peter Franken before trial and during trial neglected to adduce Dr. Franken's background as Chairman of the U.S. Air Force Adversary Group on Satellite Survivability from 1973-1983 and his testimony that the defendants' equipment was not and should not have been on the List, and in fact was in widespread use.

Third, Colonel Ted Saito, the Air Force officer in charge of approving transfer of laser mirror technology to foreign nations, conferred with Mr. Spawr and agreed to testify at the trial. When Colonel Saito did not appear at trial, Dougherty falsely stated that he had contacted him, but that he

now refused to testify. Colonel Saito has filed a declaration stating that he was never contacted by Dougherty and that his calls to Dougherty were not returned. Defendants assert that the testimony of both of these two was crucial to their defense that the device was not regulated by the Act. They point out that if the device is not on the List, then a license to export is not required and exportation without a license does not constitute a criminal violation.

It is not clear whether Mr. Dougherty made a tactical decision that the expert testimony would not be useful and therefore decided not to follow Mr. Spawr's apparent requests, or whether Mr. Dougherty simply neglected to investigate these witnesses and subsequently tried to cover himself by claiming that he had. In either case, the Court does not believe that its original conclusion should be disturbed. Again, the Court does not find that Mr. Dougherty's representation was performed in a manner so inadequate that defendants have shown "cause" to raise these issues collaterally.

Even if defendants were able to establish "cause," they have not suffered actual prejudice. The Court has already held that "the executive branch determines which items or information must be regulated to effectuate the many domestic and international policies enumerated in the Act." The Court believes that the expert testimony taken on the question whether the Spawrs' laser mirrors were in fact on the List was more than sufficient for the Court to make its determination. The government correctly notes that nothing in the declarations of Dr. Franken or Colonel Saito changes the basic principle that it is the function of the executive branch, not that of the proffered experts, to determine the licensability of commodities in general and the Spawrs' laser mirrors in particular. Whether the device is not on the List, or should be on the List , were not questions which went to jury. Consequently, the expert testimony the Spawrs proffer here would have had no appreciable effect on the outcome of the case.

C. Prosecutorial misconduct

If sufficiently severe, prosecutorial misconduct may deny a defendant a fair trial and thereby justify either the dismissal of the indictment or the order of a new trial. *United States v. Samango*, 607 F.2d 877, 884-5 (9th Cir. 1979). Here, the Spawrs must not only show that the prosecutorial misconduct occurred, but also "cause" for not raising the issue at trial or on appeal and actual prejudice from the failure to do so. On appeal, the Spawrs alleged three instances of misconduct: a failure to return some exculpatory documentary evidence provided pursuant to government subpoenas, an impermissable interference with a defense witness, and a televised interview of the prosecutor where he generally discussed the case.

(a) Suppression of exculpatory evidence

Defendants now point to two additional alleged acts of prosecutorial misconduct involving suppression of exculpatory evidence. First, Mr. Wu, the Assistant U.S. Attorney who prosecuted the case, interviewed Professor Allen E. Hill as a prospective expert witness. He put Mr. Wu on notice that the only laser related items that were on the List were items that possess or can be adapted or redesigned and upscaled to possess weapons grade capability -- a capability the Spawrs claim their equipment does not possess. Defendants claim that Mr. Wu did not turn this information over to the defendants but instead called technical witnesses at trial whose testimony obfuscated the difference between "advance gas flow" technology which is on the List and the technology employed in the Spawrs' laser mirror. Second, defendants assert that Mr. Wu subpoenaed Dr. Franken who also stated that the Spawrs' laser mirror is not on the List, but Mr. Wu failed to turn over

this information to the defendants. Thus, defendants argue that in both instances, Mr. Wu suppressed exculpatory evidence.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), the suppression by the prosecution of exculpatory evidence violates due process of law where the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution.

Even if the defendants could show "cause" for not having raised these grounds earlier on appeal with the other grounds for prosecutorial conduct, a showing the Court believes they fail to make, the Court finds that because the expert witness testimony of Professor Hill and Dr. Franken cannot be properly viewed as exculpatory evidence, the prosecutor's obligation under *Brady* was not triggered. Consequently, Mr. Wu's actions cannot be viewed as misconduct. This proposed expert testimony cannot be considered exculpatory because both of the experts' opinions go to the question of whether the Spawrs' laser mirrors are on the List. Defendants admit as much when they point to the opinions of these two experts and argue that the real issue in this case is whether the device was in fact on the List. As the Court has stated before, however, the executive branch, not the experts, determines whether a commodity is on the List. The issue is not one which goes to the jury; hence, further expert testimony would have been of little use to the defendants because the Court believes that it had more than adequate testimony before it to render its decision. Thus, it cannot be said that defendants have suffered any actual prejudice because this evidence was not before the Court. These grounds are insufficient for the relief defendants request.

(b) Intentional misrepresentation to the Court

Defendants assert that the prosecution intentionally submitted the wrong List to the Court, and the Court failed to

detect the deception and consequently relied on the wrong List in formulating the jury instructions. Specifically, defendants assert that the prosecution did not submit the correct List found at 15 C.F.R. 399.1, but a list known officially as "Interpretation 29," found at 15 C.F.R. 399.2. Interpretation 29 sets forth the "general industrial equipment" for which a validated license is required for export to Libya, Cuba, Kampuchea, North Korea and Vietnam.

After reviewing the transcript and the two lists that the defendants have submitted, Interpretation 29 and the correct List, it is the Court's recollection that the prosecution submitted both lists. Thus, while Interpretation 29 may have been extraneous material, the Court did have the correct List before it. Moreover, the correctness of the jury instructions was reviewable on appeal.

Like defendants' other allegations of prosecutorial misconduct, even if defendants could show "cause" for not having raised these grounds earlier, a showing they failed to make, they suffered no prejudice from the alleged misrepresentation. Dougherty's failure to object to Interpretation 29 cannot in any way be viewed as prejudicial. Finally, defendants have submitted no evidence which shows that the prosecution intended to mislead the Court. This ground is therefore insufficient for the relief defendants request.

D. Failure to file the Court's order timely.

Finally, defendants assert that Mr. Dougherty failed to file on time the Court's order allowing Mr. Spawr to serve his sentence in a halfway house rather than in a pentitentiary [sic]. As a result, the order was not honored and Mr. Spawr was incarcerated at Boron Federal Prison.

Mr. Dougherty's failure does not provide grounds under section 2255 for setting aside the defendants' sentences.

Dated: July 28, 1987

/s/
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX C

United States Court of Appeals For the Ninth Circuit

United States of America, Plaintiff-Appellee	)	No. 87-6272
	)	DC Nos.
v.	)	CR-80-0789-WMB
	)	and
Spawr Optical Research, Inc.	)	CR-85-3193-WMB
Walter J. Spawr, and	)	
Frances Spawr,	)	
Defendants-Appellants	)	OPINION
	)	

BEFORE: PREGERSON, WIGGINS, and BRUNETTI, Circuit Judges

Judge Wiggins and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Pregerson has voted to grant the petition for rehearing and allow the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

TITLE 50, APPENDIX - WAR AND NATIONAL DEFENSE
§§ 2401 - 2413

EXPORT REGULATION
PUB. L. 91-184, DEC. 30, 1969, 83 STAT. 841

* * *

§ 2403. Authority to effectuate policy

* * *

(b) Presidential determinations; rules and regulations; allocation of export licenses; export decontrol, investigation; Presidential removal of unilateral export controls; priority to controls; report to President and Congress

(1) To effectuate the policies set forth in section 3 of this Act [section 2402 of this Appendix], the President may prohibit or curtail the exportation from the United States, its territories and possessions, of any articles, materials, or supplies, including technical data or any other information, except under such rules and regulations as he shall prescribe. To the extent necessary to achieve effective enforcement of this Act [sections 2401 to 2413 of this Appendix], these rules and regulations may apply to the financing, transporting, and other servicing of exports and the participation therein by any person. Rules and regulations may provide for denial of any request or application for authority to export articles, materials, or supplies, including technical data, or any other information, from the United States, its territories and possessions, to any nation or

combination of nations threatening the national security of the United States if the President determines that their export would prove detrimental to the national security of the United States, regardless of their availability from nations other than any nation or combination of nations threatening the national security of the United States, but whenever export licenses are required on the ground that considerations of national security override considerations of foreign availability, the reasons for so doing shall be reported to the Congress in the quarterly report following the decision to require such licenses on that ground to the extent considerations of national security and foreign policy permit.

* * *

(2) . . . Notwithstanding the provisions of paragraph (1), the President shall remove unilateral export controls on the export from the United States of articles, materials, or supplies, including technical data or other information, which he determines are available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States, except that any such control may remain in effect if the President determines that adequate evidence has been presented to him demonstrating that the absence of such a control would prove detrimental to the national security of the United States. The nature of such evidence shall be included in the special report required by paragraph (4).

* * *

(d) Necessity of authorization or permission to export

Nothing in this Act [sections 2401 to 2413 of this Appendix] or the rules or regulations hereunder shall be

construed to require authority or permission to export, except where required by the President to effect the policies set forth in section 3 of this Act [section 2402 of this Appendix].

* * *

§ 2405. Violations and Penalties.

(a) Generally; subsequent offenses

Except as provided in subsection (b) of this section, whoever knowingly violates any provision of this Act [sections 2401 to 2413 of this Appendix] or any other regulation, order, or license issued thereunder shall be fined not more than $10,000 or imprisoned not more than one year, or both. For a second or subsequent offense, the offender shall be fined not more than three times the value of the exports involved or $20,000, whichever is greater, or imprisoned not more than five years, or both.

(b) Export to Communist-dominated nations; penalties

Whoever willfully exports anything contrary to any provision of this Act [sections 2401 to 2413 of this Appendix] or any regulation, order or license issued thereunder, with knowledge that such exports will be used for the benefit of any Communist-dominated nation, shall be fined not more than five times the value of the exports involved or $20,000, whichever is greater, or imprisoned not more than five years, or both.

* * *

§ 2407. Exemption from administrative procedure and judicial review provisions.

The functions exercised under this Act [sections 2401 to 2413 of this Appendix] are excluded from the operation of sections 551, 553-559, and 701-706, of title 5 United States Code.

* * *

APPENDIX E

15 C.F.R. 399.1

Commodity Control List-399.1 7299(23) - 7299(27) CCL-61
|| 611 || QSTVWYZ || 500 || 500 || 0 || R

. . . 7299(25)A Lasers, n.e.c., except (a) argon, krypton, and dye lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 20 watts; (b) helium-cadmium and nitrogen lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 120 watts; (c) helium-neon lasers with an output wavelength shorter than 0.8 microns; (d) ruby-lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) an energy output not exceeding 2 joules per pulse; (e) CO_2 lasers with all of the following characteristics: (i) an output wavelength in the range of 9 to 11 microns, (ii) a pulsed output not exceeding 2 joules per pulse and an average or continuous wave maximum rated output power not exceeding 1,200 watts, and (iii) in which the beam, electrical excitation, and gas flow, if any, are in the same direction, or those using the TEA (transverse excitation atmospheric) principle for excitation; and (f) Nd:YAG and Nd: Glass lasers with both of the following characteristics: (i) an output wavelength of 1.06 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 10 watts; and specially designed parts and accessories, n.e.c. (Specify by name and model number.)

APPENDIX F

15 C.F.R. 399.2

Interpretation 29: General Industrial Equipment

The commodities listed below require a validated license for export to **Country Groups S and Z.**

General industrial equipment and parts therefor, n.e.s. *the following only:*

Abrasive circulators
Abrasive-coating
Accumulators, hydraulic
Aerators
Agricultural machines and appliances, n.e.s.
Airconditioning machines, n.e.s.
Air or gas compressors, n.e.s.[1]
Air heaters, portable, fuel, fired, n.e.s.
Armature winding
Assembling fixtures, production, *except for production of military equipment*
Basket-making
Battery-making
Binoculars and telescopes, including astronomical telescopes, n.e.s.
Bituminous pavers, finishers, and spreaders
Blenders

1 A validated license is required for this equipment and any equipment utilized in the exploration for, production of, transmission of, or transportation of petroleum or natural gas, or refining of petroleum or natural gas for energy usage, *excluding petrochemical feedstock* , as well as specially designed parts and accessories therefor, to the USSR, Afghanistan, Estonia, Latvia, and Lithuania.

Boiler room specialty tools
Bottling, canning, cleaning, dishwashing, filling, packaging, and sealing machines, n.e.s.
Broom-making
Brush-making
Button covering
Button-making
Cable-making, n.e.s.
Cable spinning
Calendering machines and similar rolling machines, n.e.s.
Candle making
Carpet sweepers, hand
Cattle stunners
Centrifuges, filtering, and purifying machines for liquids, air, and gases, n.e.s.
Cigarette and cigar making and other tobacco processing
Clay guns
Cleaners, ultrasonic, n.e.s.
Cleaning equipment, n.e.s., for magnetic tape and other recording media
Cleaning units, sack
Coil winding for electrical components
Coiling, flexible casing or flexible tube
Color mixing and dispensing
Concrete pavers, finishers, and spreaders
Coolers, evaporative type
Cordage making
Cranes, n.e.s., nonmilitary
Creosoting, wood products
Dehumidifiers, non-freezing
Diving bells or suits, mechanically equipped
Drawing, marking out, calculating, drafting, measuring, and checking appliances and machines, mechanical, nonelectric, or nonelectronic, n.e.s.
Environmental chambers, n.e.s.
Excavating, leveling, mining, oilwell drilling, well drilling, construction, and maintenance equipment, n.e.s.[1]
Fans and blowers, n.e.s.
Fermentors
Filament winding, n.e.s.
Filters, ferro-magnetic

Flame arrestors
Floor finishers, sanders, scrubbers, and surfacers, industrial type
Fluorescent disposal units
Food processing machines
Freeze dryers
Fumigation chambers
Fur-blowing
Fur-treating
Garbage grinders, commercial and industrial
Gas operated welding, cutting, brazing, and surface tempering machines and appliances, n.e.s.
Gas or liquid supply meters, n.e.s.[1]
Gas turbine engines, n.e.s.[1]
Glass working machines, n.e.s.
Grinders and crushers, laboratory
Hand tools, n.e.s.
Hat-blocking and hat-making
Homogenizers, laboratory
Humidifiers, air
Ice breakers
Ice-crusher slingers
Ice saw and drill, combination type, engine driven
Impregnators, non-centrifugal
Incinerators, commercial and industrial
Incubator shakers
Industrial and laboratory nonelectric furnaces and ovens, n.e.s.
Internal combustion engines, reciprocating
Internal pneumatic line-up clamps for welding transmission line pipe[1]
Lifting, loading, and conveying machines and equipment, n.e.s.
Line-travelling coating and wrapping for pipes and tubes[1]
Linoleum-making
Lubricating
Machinery and equipment, n.e.s.. for the manufacturing and assembling of electronic components, n.e.s.
Machines, n.e.s., for processing and working wood, cork, bone, ebonite, glass, plastics, cement products, stone, and similar mineral materials

Machines, n.e.s., for treatment of a material involving a change in temperature
Mattress filling
Measureograph for measuring cloth
Mechanical appliances for testing physical properties of industrial materials, n.e.s.
Mechanical instuments, n.e.s., for measurement, transmission, or control of temperature, pressure, or other variables of liquids or gases[1]
Mechanical watches and clocks
Metal finishing, chemical
Metallurgical, mill, and foundry equipment, n.e.s.
Metering and mixing, n.e.s.[1]
Microscopes, except electron and proton, n.e.s.
Nutters
Office machines, n.e.s.
Oil field wire line and downhole equipment[2]
Optical elements and appliances, n.e.s.
Paint markers and mixers
Paper making machinery
Photoprinters, n.e.s.
Pin ticketing (tag-to-product applying)
Pipe line cleaning[1]
Plastic working, n.e.s.
Power sweepers
Power transmission equipment, n.e.s.
Presses, n.e.s.
Printed circuit board laminating presses and lead masters
Printing machines, n.e.s.
Proportioning, mixing, and dispensing resins
Pulsating dampeners
Pumps for liquids, n.e.s.
Reels, hose and cable, power operated
Refractory injection guns
Refrigerant charging apparatus, automatic
Refrigeration equipment, n.e.s.
Ribbon coiling
Roller coasters, n.e.s.
Rope-making
Rubber extruding processing

Rubber products manufacturing, n.e.s.
Searchlights and spotlights
Shaking machines, laboratory
Shock absorbers, mechanical or hydraulic
Shoelace tipping
Smoke generators, *except military*
Snow throwers, self-propelled
Soldering, automotive wave and reflow type
Sonic sewing machines
Special purpose industrial vehicles, n.e.s., nonmilitary, *e.g.*, cement mixers, street and airfield cleaning, asphalt mixers, seismograph thumper mounted trucks, mine shuttle vehicles, trucks, with derrick assembly and similar equipment for drilling, mounted integral to truck frame, etc.
Spinning
Spraying machines, n.e.s.
Steam cleaning
Steam generating power boilers, engines, and turbines, n.e.s.
Stone products manufacturing
Surgical dressing making
Surveying, hydrographic, meteorological, hydrological, and geophysical instruments, n.e.s.
Sweepers, road
Tank-cleaning
Tanks with agitators
Taping machines for covering wire and cable
Textile and leather working machines, n.e.s.
Tire building, recapping, and repairing
Toothbrush manufacturing
Track press for repairing tractor crawlers or tracks
Transfer machines, nonmetalworking, *except for assembling, gauging, or packaging of munitions*
Tube cleaners
Tube expanders, maintenance type
Typemaking and typesetting machines, n.e.s.
Vacuum cleaners
Valves, plumbing fixtures, cocks, and taps, n.e.s.
Vegetable oil mill
Vibrating paper joggers
Vibrators, hydraulic

Wall-board plaster core
Watch-cleaning
Water bath shakers
Watercraft controls, nonelectric, *except military* (for example, steering equipment excluding rudders and remote controls)
Water turbines, water engines, wind, and hot air engines
Wax molding
Waxing industrial
Weed cutting, underwater
Weighing machines
Welders, plastic, ultrasonic
Welding machines, n.e.s.
Welding rod brushing and feeders
Wheel tractors, including garden, log skidders, and contractors earthmoving types, n.e.s.
Wind tunnels, subsonic
Winding, n.e.s.
Windshield wipers, nonelectric
Wire braiding, wire rope-making, wire stitching, and measuring
stripping, cutting, and terminal attaching
Zipper manufacturing

COUNTRY GROUPS

15 C.F.R. § 370 Supplement No. 1

For export control purposes, foreign countries are separated into eight country groups designated by the symbols "P", "Q", "S", "T", "V", "W", "Y", and "Z". Listed below are the countries included in each country group. Canada is not included in any country group and will be referred to by name throughout the Export Administration Regulations.

* * *

Country Group S

Libya

* * *

Country Group Z

Cuba
Kampuchea
North Korea
Vietnam

APPENDIX G

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D. C. 20230

July 2, 1987

Mr. Steven R. Perles
1320 9th Street. N. W.
Suite 500
Washington, D. C. 20036

Dear Mr. Perles:

This letter is in confirmation of your telephone conversation of July 1, 1987 with Ms. Toni Jackson regarding the March 19, 1987 Freedom of Information Act (FOIA) request submitted by your client Walter J. Spawr.

On June 30, 1987, the Office of Export Enforcement forwarded to this office documents it located in response to Mr. Spawr's request. These documents are classified and must undergo a declassification review to determine what, if any, information may be released to Mr. Spawr. We have initiated this process, which will involve review within the Department of Commerce, as well as consultation with other agencies.

The documents relate to export license application 209559 submitted by Spawr Optical Research, Inc. on May 14, 1976. The application was for the export of fourteen copper laser mirrors, valued at $31,842.50 to the Physics Institute, University, Moscow, U.S.S.R. The application was submitted

for interagency review through the Advisory Committee on Export Policy (ACEP) Operating Committee on August 30, 1976 with a preliminary recommendation by the Commerce licensing officer. The Operating Committee recommended denial of the application on October 4, 1976.

I hope the above information is helpful to you. We will pursue the review of these documents as quickly as possible.

Sincerely,

Daniel O. Hill
Director
Program Review Staff
Export Administration

FOI 1987-116

OC DOCUMENT NO. 5653

Value:	$30,842.50
End Use:	To study the interaction of light and particle beams with gases of high temperature.
Export Control Status:	IL-1522; prior COCOM clearance is a US responsibility; CCL No. 8611(1)A.

DESCRIPTION AND USES

The mirrors are manufactured from high purity copper and are useable over a broad wavelength spectrum. The predominant use is in the laser field, and particularly with CO_2 lasers. They are capable of a damage threshold of greater than 120 kilowatts/cm^2 and are used primarily with CO_2 lasers with CW power levels of approximately 200 watts. They can and are being used with CO_2 lasers with power levels exceeding 1200 watts. It is not possible without knowing the specifics about the laser with which these mirrors are utilized, to determine the maximum level at which they can operate.

These mirrors are being used in commercial and military applications. Some commercial applications include welding and pollution studies. General Motors is utilizing similar mirrors in conjunction with a laser to case harden engine cylinder walls to achieve longer lifetimes. ERDA is utilizing these mirrors in their laser isotape separation and laser fusion

programs (the intended end use in this case). DOD is also utilizing these mirrors in some classified high energy programs.

LICENSING HISTORY

The reference OC document concerned laser optics designed for use with CO_2 lasers operating below 1000 watts. The mirrors in this case are capable of operating at levels exceeding 1200 watts. The referenced case was approved for demonstration in the USSR.

FOREIGN AVAILABILITY

Comparable laser mirrors are available from Mirror Technique of Switzerland, a division of Laser Technique of Switzerland.

EXPORT CONTROL STATUS

These mirrors are covered under IL-1522 since they are components for lasers which have not been specifically excluded. Although they are not specially designed for lasers and are used with other light sources, their predominant usage is with CO_2 lasers and, therefore, covered by IL-15222.

RECOMMENDATION

Commerce recommends approval of this case based upon the appropriate non-strategic end use and non-COCOM foreign availability. COCOM approval will be secured prior to licensing.

APPENDIX H

DECLARATION
in the matter of
United States v. Spawr, et.al., CR 80-789-WMB
CV 85-3193-WMB

Albuquerque, New Mexico

Alan E. Hill declares as follows:

1. I am President and Chief Scientist of Plasmatronics. I append hereto a summary of my experience, accomplishments and publications, a resume which was given to Assistant U.S. Attorney Theodore Wu, the prosecuting attorney in the above-noted case. On the basis of this resume, Mr. Wu subpoenaed me to be an expert witness for the prosecution in the subject case.
2. It is my understanding that Walter Spawr, Frances Spawr, and Spawr Optical Research, Inc. were convicted of violating Commodity Control List regulation 7299 (25), attached hereto.
3. After being subpoenaed and scheduled to testify as a prosecution expert witness at this trial, and prior to the conduct of the trial, I conferred with prosecutor Wu at a series of meetings in Los Angeles. At the first meeting, Mr. Wu showed me a cross-section of a weapons grade double pass mollybdenum laser mirror which he stated was the type of mirror allegedly exported by defendant Walter Spawr. I later learned that this was not the type of mirror which SPAWR had been alleged to have exported. I informed Mr. Wu that I was completely familiar with the equipment Mr. Spawr regularly manufactured and was accused of illegally exporting, and that the Spawr and similar mirrors were in widespread use.

4. I also told Mr. Wu that, while employed as a Chief Scientist of the High Energy Laser Development Branch at the U.S. Air Force Weapons Laboratory, the Department of Commerce solicited from me the criteria upon which I would list laser equipment on the Commodity Control List. The regulation in question, attached hereto, was identical to my recommendation. I explained to Mr. Wu that the only laser related items that were listed on the regulation in question on the Commodity Control List were items that have, or can be adapted to have, or can be redesigned and up-scaled to have, weapons grade capability. I also explained that the SPAWR equipment did not and could not have such capability.

5. The regulation in question restricting export would apply only to the so called "advance gas flow" technology used to generate a laser beam, but not specifically to the mirrors manufactured and exported by Walter Spawr -- which is entirely different.

6. I further told him that even if the generic type of mirrors manufactured and exported by Walter Spawr were regulated, the Spawr equipment did not meet the standard for inclusion on the Commodity Control List that I recommended, because the SPAWR equipment was not an advanced technology laser mirror capable of reflecting a laser beam, at the high power levels required for possible laser weapons applications, without so distorting the beam as to render it useless for military applications and that the items in question did not have, nor could they be adapted to have, or be redesigned and up-scaled to have, weapons grade capability.

7. I waited outside the courtroom several hours, but was never called to testify, and I was eventually excused.

I solemnly declare and affirm under penalty of perjury that the information in the foregoing declaration is true and correct.

{Signature }
Alan E. Hill

15 C.F.R. 399.1

Commodity Control List-399.1 7299(23) - 7299(27) CCL-61
|| 611 || QSTVWYZ || 500 || 500 || 0 || R

. . . 7299(25)A Lasers, n.e.c., except (a) argon, krypton, and dye lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 20 watts; (b) helium-cadmium and nitrogen lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 120 watts; (c) helium-neon lasers with an output wavelength shorter than 0.8 microns; (d) ruby-lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) an energy output not exceeding 2 joules per pulse; (e) CO_2 lasers with all of the following characteristics: (i) an output wavelength in the range of 9 to 11 microns, (ii) a pulsed output not exceeding 2 joules per pulse and an average or continuous wave maximum rated output power not exceeding 1,200 watts, and (iii) in which the beam, electrical excitation, and gas flow, if any, are in the same direction, or those using the TEA (transverse excitation atmospheric) principle for excitation; and (f) Nd:YAG and Nd: Glass lasers with both of the following characteristics: (i) an output wavelength of 1.06 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 10 watts; and specially designed parts and accessories, n.e.c. (Specify by name and model number.)

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1708

In the Supreme Court of the United States

OCTOBER TERM, 1989

SPAWR OPTICAL RESEARCH, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
STEPHEN L. NIGHTINGALE
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QUESTION PRESENTED

Petitioners seek further review of the denial of their motion, under 28 U.S.C. 2255, to vacate the sentences imposed upon their convictions for exporting laser mirrors to the Soviet Union without a validated export license. Petitioners contend that their counsel at trial were ineffective because they failed to develop evidence that their laser mirrors were not on the portion of the Commodity Control List—the list promulgated by the Secretary of Commerce of items and categories of items whose exportation is subject to regulation—that specifies goods for which a validated export license is required and that the government withheld exculpatory evidence and misled the trial court on this point. The question presented is:

Whether any evidence that the prosecution allegedly withheld or that petitioners' trial counsel failed to present related to a triable issue of fact.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	18
Carella v. *California*, No. 87-6997 (June 15, 1989)	23
Cox v. *United States*, 332 U.S. 442 (1947)	23
Dart v. *United States*, 848 F.2d 217 (D.C. Cir. 1988)	22
Estep v. *United States*, 327 U.S. 114 (1946)	23
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	23
United States v. *Frady*, 456 U.S. 152 (1982)	6
United States v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987), cert. denied, 108 S. Ct. 1994 (1988)	22
United States v. *Mandel*, 696 F. Supp. 505 (E.D. Cal. 1988)	22
United States v. *Mendoza-Lopez*, 481 U.S. 828 (1987)	21
United States v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983)	22
Winship, In re, 397 U.S. 358 (1970)	23

Statutes and regulations:

Export Administration Act of 1969, 50 U.S.C. App. 2401 *et seq.*:	
50 U.S.C. App. 2401 *et seq.* (1976)	2
50 U.S.C. App. 2403(b) (1976)	3
50 U.S.C. App. 2403(b)(1) (1976)	18
50 U.S.C. App. 2403(b)(2) (1976)	18
50 U.S.C. App. 2403(c) (1982 & Supp. V 1987)	18
50 U.S.C. App. 2404(f) (1982 & Supp. V 1987)	18

Statutes and regulations—Continued: Page

50 U.S.C. App. 2405(a)-(b) (1976) 4
50 U.S.C. App. 2405(b) (1976) 2, 4, 19
50 U.S.C. App. 2405(h) (1982 & Supp. V 1987) 18
50 U.S.C. App. 2407 (1976) 3, 14
Trading with the Enemy Act, 50 U.S.C. App. 5(b) (1976) 2
18 U.S.C. 371 2
18 U.S.C. 1001 2
28 U.S.C. 2255 ..... 2, 7, 8, 9, 20, 23
Exec. Order No. 11,533, 3 C.F.R. (1966-1970 comp.) 3
Exec. Order No. 11,940, 3 C.F.R. 150 (1977) 2
15 C.F.R.:
Pt. 371 (1988) 3
Section 371.5 3
Pt. 372 (1980) 3
Section 372.1(b) (1988) 11
Pt. 389:—
Section 389.2 (1977) 6

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 864 F.2d 1467. The opinions of the district court denying petitioners' Section 2255 motion and petitioners' motion for reconsideration of that denial (Pet. App. 17a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1988. A petition for rehearing was denied on February 23, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1981, following a jury trial in the United States District Court for the Central District of California, petitioners Spawr Optical Research, Inc., and Frances Spawr were convicted of misrepresenting shipment values in Shipper's Export Declarations submitted to the United States Customs Service, in violation of 18 U.S.C. 1001 (Counts 1-6). Spawr Optical was also convicted of unlawfully exporting laser mirrors to West Germany knowing that they would be transshipped to the Soviet Union, in violation of 50 U.S.C. App. 2405(b) (1976) (Counts 7-9). Finally, all three petitioners were convicted of conspiring to export laser mirrors without the requisite validated export license, in violation of 18 U.S.C. 371 (Count 10), and unlawfully exporting laser mirrors to Switzerland knowing that they would be transshipped to the Soviet Union, in violation of 50 U.S.C. App. 5(b) (1976), Exec. Order No. 11,940, 3 C.F.R. 150 (1977), and applicable export regulations (Counts 11-14).[1] Spawr Optical was sentenced to fines totalling $100,000; Walter and Frances Spawr were sentenced to terms of imprisonment that were suspended in favor of probation, with the exception of a six-month term served by Walter Spawr. On appeal, the court of appeals affirmed. 685 F.2d 1076, 1078 n.1 (1982). This Court denied certiorari. 461 U.S. 905 (1983).

In 1985, petitioners filed a motion under 28 U.S.C. 2255 to vacate their sentences. The district court denied that

[1] Counts 11-14 were prosecuted under the Trading with the Enemy Act (50 U.S.C. App. 5(b) (1976)) and Exec. Order No. 11,940 because the violations charged on those counts occurred in February 1977, after the Export Administration Act of 1969, 50 U.S.C. App. 2401 *et seq.* (1976), had lapsed. The violations alleged in Counts 7-9 predated the lapse of the Export Administration Act and were prosecuted under that statute. For purposes of this case, the difference in the statutory basis for various counts is immaterial.

motion and petitioners' motion for reconsideration (Pet. App. 17a-26a). The court of appeals affirmed, with Judge Pregerson dissenting (Pet. App. 1a-16a).

1. The Export Administration Act of 1969, 50 U.S.C. App. 2403(b) (1976), authorized the President to issue regulations prohibiting or curtailing the exportation of goods in order to effectuate various policies enumerated in the Act. Under 50 U.S.C. App. 2407 (1976), the "functions exercised under" the Act were excluded from those provisions of the Administrative Procedure Act that customarily provide judicial review of agency action. The President delegated his authority to the Secretary of Commerce (Exec. Order No. 11,533, 3 C.F.R. 932 (1966-1970 comp.)), and the Secretary promulgated regulations that, *inter alia,* prohibited exports of certain commodities identified on a Commodity Control List to particular countries, except pursuant to a validated license. See 15 C.F.R. Pt. 372 (1980).

The Commodity Control List, which the Secretary has issued and amended from time to time, specifies the commodities that are subject to export controls and indicates the licensing requirements applicable to each.[2] During the

[2] The Control List includes *any* good that is subject to regulation by the Department of Commerce. Because this country prohibits exports of virtually all commodities to a handful of countries such as Cuba, the list is very broad. Most exportations of goods on the list are authorized by general licenses—licenses not requiring individual applications. See 15 C.F.R. Pt. 371 (1988). For example, under general license GLV, goods whose value is below a specified dollar amount may be exported to almost all countries in the world. 15 C.F.R. 371.5 (1988). The focus of this case is on the portion of the Control List which in 1976 and 1977 specified goods for which a validated export license—*i.e.*, a license for a particular shipment based upon individualized consideration of an application by the exporter—was required for exportations to the countries to which petitioners' mirrors were sent.

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period relevant to this case, the regulations required a validated license for exportations, other than to Canada, of specified lasers and laser parts. The pertinent portion of the Control List included "lasers, n.e.c., [with the exception of specified types of lasers whose characteristics were set out in detail] and specially designed parts and accessories, n.e.c." (Pet. App. 32a). One of the exceptions made it unnecessary to obtain a validated license for "CO_2 lasers" with, among other characteristics, "an average or continuous wave maximum rated output power not exceeding 1,200 watts" (*ibid.*). Thus, a validated license was required for CO_2 lasers whose maximum rated output power exceeded that threshold and for component parts for such lasers.

Under 50 U.S.C. App. 2405(a)-(b) (1976), it was a criminal offense to "to knowingly violate[ ] any provision of [the] Act * * * or any regulation, order, or license issued thereunder." The penalties were enhanced when a violation was committed "willfully" and "with knowledge that such exports [would] be used for the benefit of any Communist-dominated nation." 50 U.S.C. App. 2405(b) (1976).

2. The evidence at trial—which is summarized in the court of appeals' opinion in petitioners' direct appeal and our brief in opposition to the prior petition for certiorari (No. 82-1280)—showed that petitioners manufactured high quality laser mirrors. Their client list included universities, industrial users, defense subcontractors, and this country's defense agencies. 685 F.2d at 1079.

In 1974, petitioners established a relationship with a German businessman, Wolfgang Weber, in order to market their products in Central and Eastern European nations. Spawr Optical's general manager attended a conference on the Commerce Department's export regulations, and he and Walter Spawr received and reviewed the

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Department's then-current Control List. Under the regulations then in effect, a validated license was required for any exportation to country group "Y," which included the Soviet Union, of lasers and laser components not falling within a specified exception; a validated license was also required for exportations to country group "V," which included Switzerland and West Germany, unless the export was valued at $500 or less. 685 F.2d at 1079; 82-1280 U.S. Br. in Opp. at 4.

In October 1975, Walter Spawr provided Weber with sample mirrors to exhibit at a trade show in Moscow. In January 1976, petitioners authorized Weber to accept an order for laser mirrors from a purchasing agency for the Soviet government. Petitioners delivered some of the mirrors to Weber when he visited California; they shipped the remainder to West Germany. In the shipping documents for the order, Frances Spawr falsely listed the value of each laser as $500.[3] Weber forwarded the entire order to the Soviet Union. 685 F.2d at 1079.

Later in 1976, petitioners received a second order for laser mirrors from the Soviet Union. Walter Spawr applied to the Commerce Department for a validated export license for 14 of the 29 mirrors covered by the order. 82-1280 U.S. Br. in Opp. at 5. On October 7, 1976, the Commerce Department denied the application "for national security reasons" (*id.* at 6). It found (*ibid.*):

> These laser mirrors * * * had significant strategic applications. [The license applications] have been denied in view of the predominant use with CO_2 lasers, which have important applications in the

---

[3] A former employee of Spawr Optical testified that Frances Spawr directed her to undervalue the laser mirrors on the shipping documents "so that we wouldn't be required to have an export license." 82-1280 U.S. Br. in Opp. at 5 n.3.

> military arena * * *. [E]xports of such * * * commodities to Eastern European destinations could contribute significantly to the military capabilities as to constitute a potential threat to our national security.

Petitioners had a right to an administrative appeal of that determination (15 C.F.R. 389.2 (1977)), but did not pursue one. See Tr. 668-670. Rather, they shipped the mirrors to Switzerland, again using shipping documents that falsely stated that the value of each mirror was $500 or less. Upon receiving the mirrors, Weber relabelled the boxes and shipped them to Moscow. 685 F.2d at 1079.[4]

At trial, the government introduced expert testimony that both orders consisted of water-cooled laser mirrors designed for CO_2 lasers rated at greater than 1200 watts. *E.g.*, Tr. 1013-1014, 1041-1047, 1126-1127, 1936-1952; see Tr. 1056-1058, 1081-1090, 1100-1102. In its final jury charge, the trial court read verbatim the relevant portion of the Control List and the regulation prohibiting exportations of commodities on the list without a license, along with other pertinent statutory provisions. Tr. 2313-2319. The instructions continued (Tr. 2319):

> In order to establish the offenses charged in counts seven through nine and eleven through fourteen of the indictment [the exportation without a license counts], the United States must prove beyond a reasonable doubt three essential elements:

---

[4] When the application was made, Frances Spawr told an employee that she did not expect the Commerce Department to approve it because the laser mirrors were "going to Russia," but that they would "still send the mirrors" even if the application were disapproved. After the Commerce Department denied petitioners' application, Frances Spawr told the employee that they would "still sell the mirrors to Russia" by "using some address in Switzerland." 82-1280 U.S. Br. in Opp. at 5-6 n.5.

> First, that on the dates charged in the respective counts, the defendant willfully exported water-cooled copper laser mirrors from the United States to a foreign country;
>
> Second, that the defendant made these exports with the knowledge that the laser mirrors would be used for the benefit of a Communist dominated country; and,
>
> Third, that in the course of each export, an applicable governmental export control licensing regulation was violated.

The jury found the corporation guilty on the substantive counts arising from the first order, and all three petitioners guilty of the count alleging conspiracy to violate the export regulations and the substantive counts arising from the second order. See 685 F.2d at 1078 n.1.

3. a. The present case arises from petitioners' 1985 motion to vacate their sentences under 28 U.S.C. 2255. The motion asserted ten grounds, none of which had been raised at trial or on direct appeal from the convictions. *United States* v. *Spawr Optical Research, Inc.*, No. CV 85-3193-WMB (C.D. Cal. Oct. 9, 1986), slip op. 2.[5] Petitioners contended, *inter alia,* that their trial attorneys had provided ineffective assistance of counsel and that the prosecution had withheld exculpatory evidence. *Ibid.*

The court rejected petitioners' contention that their trial attorneys had provided ineffective assistance of counsel "in light of the overwhelming evidence of guilt at trial." *Spawr Optical Research, Inc.* v. *United States,* slip op. 9. Further, applying the "cause" and "prejudice" test outlined in *United States* v. *Frady,* 456 U.S. 152 (1982), the court found that any alleged inadequacy did not constitute

---

[5] The district court's opinion was not included in petitioners' appendix. We have lodged ten copies of the opinion with the Clerk.

"cause" excusing petitioners' failure to raise the grounds asserted in the Section 2255 motion at trial or on direct appeal. The court observed that "[t]here is little merit to the Spawrs' contentions, and their counsels' failure to raise these issues at trial or on appeal reflects more this lack of merit than it does any negligence on the part of counsel." Slip op. 6-7, 10. Finally, the court concluded that petitioners had not been prejudiced by any of the errors raised in their motion. Addressing each of those claims in turn, the district court determined that each was without merit. *Id.* at 10-17.

b. In a motion for reconsideration of that decision and in a supplemental motion, petitioners raised for the first time the claims that are the subject of the petition. They argued, *inter alia,* (i) that their trial counsel had failed to present expert testimony that petitioners' lasers were not on the Control List and to depose prosecution witnesses on that issue; (ii) that the prosecutor had withheld the information he obtained from potential government witnesses that the Spawr mirrors were not on the list; (iii) that the prosecutor had supplied the trial court with an incorrect version of the Control List, thereby misleading the court and the jury; and (iv) that the government had withheld a document authored by a witness that established, as petitioners construed it, that equivalent lasers were available in Switzerland. See Pet. App. 21a-25a.

The district court rejected these contentions. It first renewed its finding that defense counsel's representation at trial was "not so * * * inadequate that [petitioners] have shown 'cause' to raise these issues collaterally." Pet. App. 22a. The court also found, in the alternative, that defense counsel's alleged failure to develop expert testimony on the question whether petitioners' lasers were or should have been on the Control List, and any withholding of information on that question, did not prejudice petitioners. *Id.* at

22a, 24a. Observing that "the executive branch determines which items or information must be regulated to effectuate the many domestic and international policies enumerated in the Act," the court stated that it had made a determination, based on expert testimony, that the lasers were on the list. *Id.* at 22a; see *id.* at 24a. The court continued, "Whether the device is not on the List, or should be on the List, were not questions that went to the jury." *Id.* at 22a. Thus, the court continued, the expert testimony petitioners believed their trial counsel should have offered "would have had no appreciable effect on the outcome of the case" (*ibid.*), and the evidence allegedly withheld by the prosecutor could not be considered exculpatory (*id.* at 24a).

Finally, the district court rejected the contention that the prosecutor had submitted the wrong version of the Control List in response to the court's request at trial. Based on its review of the transcript and the lists in question, the court recalled "that the prosecution submitted both lists," and it concluded that it "did have the correct List before it." Pet. App. 25a.

4. On appeal, petitioners renewed the contentions they had first raised in their Section 2255 motion for reconsideration and supplemental motion. The court of appeals affirmed, with Judge Pregerson dissenting (Pet. App. 1a-16a).

The majority concluded that none of the alleged trial defects was material. It observed that all of petitioners' claims of prosecutorial misconduct and ineffective assistance of counsel related to the issue whether petitioners' lasers were included on the portion of the Control List for which a validated license was required. Pet. App. 10a. The majority noted that the Secretary of Commerce had been designated "the coordinating official in the area of export administration," and stated that "[i]t would severely un-

dermine the Secretary's authority if judges and juries in individual criminal proceedings were permitted to reverse licensing determinations." *Id.* at 11a-12a. Observing that the statute prohibited violations of not only "the particular statute or its regulations, but also any license or order issued thereunder," the majority concluded (*id.* at 12a-13a):

> In this case, the Secretary has determined that [petitioners'] mirrors could not be exported without an export license. Right or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that [petitioners'] mirrors were included on the CCL and therefore subject to the licensing requirement. Because the licensing issue was not an element of the charged offenses, [petitioners] are not denied due process or the right to a jury trial by deference to the Secretary's determination. Rather, given the Secretary's determination, the prosecution must prove only that [petitioners] exported their mirrors without the necessary license and with the appropriate mental state.[6]

Judge Pregerson dissented. Pet. App. 13a-16a. He agreed with the majority that "the Secretary of Commerce's decision to place a commodity on the Commodity Control List * * * is not subject to judicial review." *Id.* at 13a. In his view, however, an essential element of the charged offenses was that petitioners' lasers

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[6] The majority noted that the trial court had heard testimony and instructed the jury with respect to the Control List. But it determined that because "the need for an export license had already been established conclusively by the Secretary," it was "harmless to place this issue before the jury." Pet. App. 13a.

were in fact on the Control List at the time they were exported. He concluded that "[i]t was for the jury, not the Secretary of Commerce, to determine whether [petitioners'] laser mirrors were in fact an item listed on the CCL." *Id.* at 16a.

ARGUMENT

We do not subscribe entirely to the reasoning of the majority of the court of appeals. However, the court's conclusion is correct: none of the evidence that petitioners now assert that their trial counsel should have introduced, or that the prosecutor allegedly withheld, was material or admissible. Accordingly, further review is not warranted.

1. The theory of the prosecution on the counts relevant to the petition was that petitioners had conspired to violate, and had violated, an export control regulation that prohibited exportation without a validated license of goods for which such a license was required.[7] Accordingly, the government was required to prove that the laser mirrors that petitioners exported to the Soviet Union were included within the portion of the Commodity Control List that specified the commodities to which the validated licensing requirement applied.

The relevant Control List did not attempt to list each individual laser component for which an export license was required. Rather, the list included all "lasers" with specified exceptions and "specially designed parts and acces-

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[7] This regulation, 15 C.F.R. 372.1(b) (1988), stated:

> No commodity or technical data subject to the Export Administration Regulations [*i.e.*, on the Control List] may be exported to any destination without a validated license issued by the Office of Export Administration, except where the export is authorized by a general license or other authorization by the Office of Export Administration.

sories." Pet. App. 32a. To prove that the particular laser mirrors petitioners had exported were within this category, the government put on expert testimony that those mirrors were designed for use with CO_2 lasers whose output exceeded 1200 watts, the maximum allowed by the exception for lasers of that type. In its instructions, the court read the language of the Control List to the jury. Thus, the jury's guilty verdicts necessarily reflected its findings that petitioners' laser mirrors were laser components for which a validated license was required.

Petitioners now contend that their trial counsel should have presented evidence that the laser mirrors were not "on" the Control List—and that the government withheld exculpatory evidence on that issue. Notably, however, the record does not reflect that any of that evidence relates to the *factual* issue framed by the Control List—which is whether petitioners' laser mirrors were designed for CO_2 lasers whose characteristics made them subject to the validated licensing requirement. Rather, that evidence would relate only to the issues of how the pertinent portion of the list was understood by persons who had participated in its drafting and whether, in view of the nature of the laser mirrors' potential military and civilian applications, the list should be interpreted to include them. No evidence of that type would have been admissible at trial. Accordingly, trial counsel cannot be faulted for failing to offer it, and even if the prosecution had withheld information of that type—a contention not sustained by the record—that information would not have been exculpatory or material.

In the court of appeals and this Court, petitioners have argued that their rights were violated by (a) the prosecution's alleged suppression of evidence from two potential expert witnesses, Alan Hill and Theodore Saito, who, according to petitioners, would have testified that petitioners' lasers were not on the Control List (Pet. C.A. Br.

7-8, 13; Pet. C.A. E.R. 98-107); (b) trial counsel's allegedly negligent failure to question defense expert witness Dr. Peter Franken concerning his understanding of the list – or to depose or serve interrogatories upon government witnesses regarding their views (Pet. C.A. Br. 8; Pet. C.A. E.R. 108-111; see Pet. 4, 23); (c) the alleged suppression of a document said to establish that petitioners' lasers could not lawfully be included on the Control List (Pet. C.A. Br. 29-33; Pet. 24); and (d) the prosecutor's submission of a so-called "bogus list instead of the authentic CCL," allegedly for the purpose of intentionally misleading the trial court (Pet. 4; see Pet. C.A. Br. 4). None of these contentions furnishes the slightest basis for disturbing petitioners' convictions.

a. Dr. Hill's declaration (Pet. App. 44a-45a) does not state that petitioners' mirrors were not designed for use with CO_2 lasers whose output exceeded 1200 watts. The declaration therefore does not address the question whether petitioners' mirrors are within the category, defined by the Control List, for which a validated license was required. Rather, Dr. Hill's declaration is directed to a quite different point. Based upon Dr. Hill's asserted role in drafting the Control List, the declaration provides his understanding of the types of technology that the list was intended to include. According to the declaration, the laser entry covered only "items that have, or can be adapted to have, or can be redesigned and up-scaled to have, weapons grade capability" and "would apply only to the so called 'advance gas flow' technology used to generate a laser beam, but not specifically to the mirrors manufactured and exported by Walter Spawr." *Id.* at 45a. The Spawr mirrors were not "specifically" covered, the declaration continues, because "SPAWR equipment was not an advanced technology laser mirror capable of reflecting a laser beam, at the high power levels required for

possible laser weapons applications * * * and * * * the items in question did not have, nor could they be adapted to have, or be redesigned and up-scaled to have, weapons grade capability." *Ibid.*[8]

Testimony of this type would have been inadmissible at trial, since it did not address the issue of fact framed by the Control List—which was whether the laser mirrors were designed for CO_2 lasers whose maximum power exceeded 1200 watts. Whether or not the relevant entry on the Control List should be interpreted to cover only technologies with military applications—or only gas flow technologies—was not an issue of fact on which evidence could be received. As the court of appeals noted, the Secretary of Commerce has been designated "as the coordinating official in the area of export administration" (Pet. App. 11a), and the statute under which the Control List was promulgated "excluded" his functions from judicial review (50 U.S.C. App. 2407 (1976)). Accordingly, the court would not have been entitled to admit testimony on any understanding that private consultants may have entertained as to the intended scope of the list, any more than it could have heard testimony from staff per-

[8] In assessing Dr. Hill's declaration, it is helpful to recall that the application of the validated licensing requirement to a particular item does not mean that the item can never be exported. Rather, when an item that is to be exported appears on a portion of the List requiring a validated license, the proposed exportation is subject to individualized consideration that may result in issuance of a validated license. Moreover, Dr. Hill's testimony concerning petitioners' laser mirrors would have been in direct conflict with the judgment of officials, whose decisions Congress excluded from judicial review, who considered petitioners' license application. Petitioners' application for a license was denied based upon a finding that their laser mirrors "had significant strategic applications" and that exports to Communist nations "could contribute significantly to [their] military capabilities [and thus] constitute a potential threat to our national security." See p. 5, *supra*.

sons who participated in drafting the Act as to their view of the purpose of the legislation.

The language of the list drew no distinction between " 'advance gas flow' technology" and other technologies, nor was it limited to lasers that experts might describe as having weapons capabilities.[9] The testimony outlined in Dr. Hill's declaration thus provides no basis for relief from petitioners' convictions.[10]

b. The allegedly negligent failure of petitioners' trial counsel to elicit expert testimony on the technologies that the Control List was intended to encompass was immaterial for the same reason. In the court of appeals, peti-

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[9] In this case, of course, there has been and can be no claim that the Secretary's interpretation of the Control List was unforeseeable or that the list failed to give fair notice of what acts were forbidden. Petitioners applied for a license, and their elaborate attempts to conceal the value and ultimate destination of their exportations reflected their awareness of the applicability of export controls. The jury was instructed in terms of the express language of the Control List.

To underscore the immateriality of Dr. Hill's proffered testimony, it is helpful to examine the impact on the trial of the admission of that testimony. If Dr. Hill were allowed to testify as to the intention of his recommendation, the government would have been no less entitled to respond with testimony concerning the intention of those persons who were responsible for the promulgation of the Control List. Testimony of that type clearly would not have presented an issue of fact for the jury.

[10] Petitioners' court of appeals brief also argued that the prosecutor "suppressed" the testimony of Col. Theodore Saito. Pet. C.A. Br. 11. Col. Saito's declaration (Pet. C.A. E.R. 104) states that he was interviewed by petitioner Walter Spawr, and agreed to testify at trial, but that he was not interviewed by Spawr's counsel or called as a witness. The declaration provides no information whatever concerning the nature of any alleged government "suppression" or the substance of the testimony that Col. Saito would have provided. Nothing in the Saito declaration casts any doubt on the validity of petitioners' convictions.

tioners relied on a declaration from Dr. Peter Franken (Pet. C.A. E.R. 109-110), who testified as a defense expert. In substance, Dr. Franken's declaration tracks Dr. Hill's declaration. The declaration asserts that Dr. Franken consulted with the Department of Commerce regarding whether "various optical devices should be placed on the Commodity Control List." "[T]he equipment manufactured by Walter Spawr was not and should not have been on the Commodity Control List," the declaration continues, since the "pertinent regulations restricting export of certain laser equipment would apply to the so-called 'advance gas flow technology' used to generate a laser beam, but not to the equipment manufactured and exported by Walter Spawr." *Ibid.* Like Dr. Hill's declaration, this proffer does not state that the Spawr mirrors exported to the Soviet Union were not designed for CO_2 lasers whose power exceeded the threshold prescribed in the Control List. Rather, the basis for the assertion that equipment manufactured by petitioners "was not on the list" was Franken's interpretation of the Control List—*i.e.*, his understanding that the list would apply only to "advance gas flow technology," a limitation nowhere mentioned in the list itself. A jury cannot be allowed to determine issues as to the legal effect of a regulation, based upon testimony by private consultants approached in connection with its drafting.

Petitioners' contention that their trial counsel was negligent in failing to depose government witnesses or to serve interrogatories (Pet. 4, 23) is groundless. Those discovery devices are generally unavailable in criminal proceedings, and it would have been clear error for the trial court to permit inquiries designed to probe the Secretary's understanding of the relevant portion of the Control List.

In short, none of the alleged negligence argued to the court of appeals and reasserted in this Court could have

had any effect whatever on petitioners' trial. Petitioners' ineffective assistance claim provides no basis for collateral relief.

c. Petitioners' next contention is that the prosecution withheld a document which, in petitioners' view, establishes that their laser mirrors could not lawfully have been included on the portion of the Control List for which a validated license was required. See Pet. App. 42a-43a. That contention fails for several alternative reasons.

At the outset, petitioners' argument rests on a serious distortion of the contents of the document. It was not, as petitioners contend, a document "in which the Secretary, through the Office of Export Administration" (Pet. 8), made a finding as to the availability of laser mirrors from Swiss producers. See also Pet. 24. Rather, it was a part of a *recommended* disposition of petitioners' application for a license.[11] Ultimately, those with final authority to pass on petitioners' application decided not to grant a license. Petitioners' effort to attribute the document to the Secretary is therefore groundless.

Second, the document's discussion was not directed to the question whether mirrors equivalent to petitioners' mirrors were "available" in the sense required to eliminate

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[11] The appendix to the petition (Pet. App. 42a-43a) reproduces only a portion of the document (pp. 2-3 of the original). The first page of the original is a cover sheet entitled "Referral of Export Application to Policy Planning Division." It refers to the attachment – the document reproduced in the appendix – as an "OC draft document" accompanying a recommendation for approval of petitioners' application for a license. "OC" is a reference to the Operating Committee, an interagency committee including, among others, representatives of the Defense Department. The Operating Committee is consulted with respect to exportations to certain destinations, including the Soviet Union. It considers whether the stated end use of the export is consistent with the Act's policies and whether the export can be diverted to military use.

the validated licensing requirement. Its focus was on whether the particular shipment should be authorized, not on the broader question whether the commodity should be reclassified.

Finally, during the relevant period, a finding of availability did not automatically require reclassification. The Secretary was empowered, under 50 U.S.C. App. 2403(b)(1) (1976), to curtail exports to "any nation or combination of nations threatening the national security of the United States if [he] determines that their export would prove detrimental to the national security of the United States, *regardless of their availability from*" other nations, as long as that determination was reported to Congress (emphasis added). The Secretary was not obligated to withdraw the validated license requirement from particular goods unless he determined that they were "available without restriction in significant quantities and comparable in quality to those produced in the United States," and even then controls could be continued if it were determined "that adequate evidence [had] been presented * * * demonstrating that the absence of such a control would prove detrimental to the national security of the United States." 50 U.S.C. App. 2403(b)(2) (1976).[12]

The correctness of the Executive Branch's actions under these provisions was not subject to judicial review, and plainly could not have been tried to the jury at petitioners' trial. Accordingly, the draft recommendation's statement that comparable mirrors were available in Switzerland raised no triable issue. It was therefore not exculpatory or material within the meaning of *Brady* v. *Maryland,* 373 U.S. 83 (1963), and its progeny.

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[12] We note that the foreign availability provisions of the Act have been amended several times since 1977. See, *e.g.,* 50 U.S.C. App. 2403(c), 2404(f), 2405(h) (1982 & Supp. V 1987). Accordingly, the correctness of petitioners' interpretation of the 1969 Act has no continuing importance.

Indeed, the Product Division's draft recommendation found that petitioners' laser mirrors were on the pertinent portion of the Control List. It noted that although those mirrors "are used primarily with CO_2 lasers with CW power levels of approximately 200 watts," "[t]hey can and are being used with CO_2 lasers with power levels exceeding 1200 watts" and that "[i]t is not possible without knowing the specifics about the laser with which these mirrors are utilized, to determine the maximum level at which they can operate." Pet. App. 42a. The draft recommendation concluded (*id.* at 43a):

> These mirrors are covered under IL-1522 [the Control List] since they are components for lasers which have not been specifically excluded. Although they are not specially designed for lasers and are used with other light sources, their predominant usage is with CO_2 lasers and, therefore, covered by IL-15222 [*sic*].

d. Petitioners argue that the prosecutor "knowingly provided the judge and jury with a bogus list instead of the authentic CCL." Pet. 4. This assertion is meritless. During a colloquy, apparently outside the jury's presence, regarding the portion of the statute that requires a "benefit" to a Communist nation for the enhanced penalty prescribed by 50 U.S.C. App. 2405(b) (1976), the prosecutor provided the trial court with a list of "general industrial equipment" whose exportation was prohibited to countries in groups S and Z (Libya, Cuba, Kampuchea, North Korea, and Vietnam). Pet. C.A. E.R. 113-118. See Pet. App. 33a-38a. The prosecutor tendered the industrial equipment list in response to the court's request for "the commodity control list, the full list"—*i.e.*, one showing "various commodities other than lasers" (Pet. C.A. E.R. 113). Although the

the court's request was not entirely clear,[13] any confusion was demonstrably immaterial.

In the Section 2255 proceeding, the district court recalled being provided with both lists. Pet. App. 25a. In keeping with the court's recollection, the record reflects that the jury instructions incorporated the language of the portion of the Control List that related to lasers, not the industrial equipment list. Pet. C.A. E.R. 88-90. Petitioners have never contended in this proceeding that those jury instructions were erroneous in any respect, or that the submission of the industrial equipment list had any effect upon the trial. Thus, petitioners' charge that the prosecutor intentionally misled the trial court and the jury is wholly unsupported.

2. We do not subscribe to that portion of the court of appeals' reasoning which suggests that illegal exportation cases can never involve an issue of fact as to whether a validated license is required for a particular commodity. Pet. App. 11a-13a.[14] If, for instance, petitioners had offered evidence that their mirrors were designed for telescopes, and could not be used with powerful CO_2 lasers, it would have been error to exclude that evidence or to withdraw the resulting question of fact from the jury.

Nevertheless, for all of the reasons stated by the majority, courts are not justified in allowed juries to reconsider judgments that the Act commits to the Executive Branch. It is not proper, under the guise of determining whether an item is "on the list," to admit evidence of what persons

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[13] As noted above, the "full" Commodity Control List does include the goods on the general equipment list. See p. 3 note 2, *supra*. However, in the context involved, the court's request seems to have referred to a different portion of the List.

[14] We emphasize that petitioners were tried on the theory that they violated applicable regulations.

who have participated in drafting the list understood it to mean, whether particular exports have strategic or non-strategic uses and the relative importance of each, and whether items available from foreign sources make it inappropriate to control exports of similar technology from this country. The government cannot be required to present evidence to support the judgments it has made on those issues, and defendants cannot be allowed to contradict them. The record reflects that petitioners' complaints with their trial counsel—and their attack on the prosecution—are based on the premise that those issues were open to litigation at their trial. Although the court of appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive, its analysis fully supports the narrower proposition that disposes of this case, which is that the particular issues petitioners seek to raise would intrude on judgments reserved for the Secretary.

A determination that those issues could not properly have been litigated at petitioners' trial would not conflict with any decisions of this Court. In *United States* v. *Mendoza-Lopez,* 481 U.S. 828 (1987), the Court held that a conviction for entering the country after being deported could not constitutionally be based on a deportation order that resulted from a fundamentally unfair deportation proceeding. The Court stated that "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838. The Court declined to reach the broader question whether violation of a regulation may be punished when Congress has foreclosed judicial review of the legitimacy of the regulation. *Id.* at 838 n.15. In any event, nothing in *Mendoza-Lopez* suggests that a per-

son cannot be prosecuted for exporting a commodity without a license unless a court reviews the policy considerations on which the Executive Branch has relied in classifying an item on the Control List.

In sum, petitioners' contentions in this case are far removed from those of the respondents in *Mendoza-Lopez*. In this case, petitioners are not seeking judicial review to compensate for any inadequacy in prior adjudicatory proceedings. Indeed, petitioners chose not to seek administrative review of the denial of their application for a license, even though that form of review was available to them. Moreover, they do not seek judicial review in the ordinary sense—review by a judge, giving appropriate deference to an agency's action. Rather, they are claiming that the issues they now seek to raise should have been tried to the jury. Nothing in *Mendoza-Lopez* supports that view.[15]

Excluding evidence of the type petitioners argue should have been presented in their trial would not have deprived

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[15] The lower court decisions on which petitioners rely provide no support for further review. *United States* v. *Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987), cert. denied, 108 S. Ct. 1994 (1988), and *United States* v. *Moller-Butcher*, 560 F. Supp. 550, 552-553 (D. Mass. 1983), held, consistent with our view, that the prosecution cannot be required to prove the correctness of judgments underlying inclusion of an item on the Control List as an element of the offense of exporting without a license. Though *United States* v. *Mandel*, 696 F. Supp. 505, 511-514 (E.D. Cal. 1988), suggests that a court should conduct a limited review of the Secretary's determination that a commodity is not available abroad, that conclusion was based on an analysis of statutory provisions passed after the period relevant to petitioners' case. We believe *Mandel* was wrongly decided, and it is presently on appeal to the Ninth Circuit. In any event, however, this Court ordinarily does not hear cases to resolve conflicts involving decisions by district courts.

Dart v. *United States*, 848 F.2d 217 (D.C. Cir. 1988), is completely inapposite. It involved the issue whether a court could review a civil penalty imposed by the Secretary upon his review of an administrative law judge's determination in an exporter's favor.

them of a jury's determination on an issue of fact. See *In re Winship,* 397 U.S. 358 (1970); *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975); *Carella* v. *California,* No. 87-6997 (June 15, 1989) (per curiam). The evidence that is now the basis of the Section 2255 proceeding was not relevant to the issue of fact framed by the regulations—whether petitioners' laser mirrors were designed for CO_2 lasers whose output exceeded 1200 watts. Evidence on that issue was presented to the jury, and the court's instructions left to the jury the question whether the language of the Control List included petitioners' lasers. "[T]he constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order." *Cox* v. *United States,* 332 U.S. 442, 453 (1947).[16]

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[16] In *Cox,* Jehovah's Witnesses argued, in prosecutions for being absent without leave, that their draft boards had incorrectly classified them. Relying on *Estep* v. *United States,* 327 U.S. 114 (1946), which held that the relevant statute could not be construed to exclude all judicial review of such draft board decisions, the Court noted in *Cox* that the defense could be raised. 332 U.S. at 453. However, it rejected the proposition that the issue should be submitted to the jury, holding that such a claim was subject only to review by the court to determine if there was any "basis in fact for the classification." *Ibid.* It explained (*ibid.*):

> Although we held in *Estep* that Congress did not intend to cut off all judicial review of a selective service order, petitioners have full protection by having the issue submitted to the trial judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to a jury.

Petitioners' reliance on *Estep* (Pet. 13-14) is entirely misplaced. At most, it would support an extremely deferential review by a judge of the validity of export control regulations in effect in 1976. Petitioners have not sought such review, and it could not furnish a basis for awarding them any relief.

At the trial, there was no serious issue that petitioners' mirrors fell within the category of laser parts, specified in the Control List, for which a validated license was required. The evidence that they could be used with CO_2 lasers of the requisite wattage was not seriously disputed, and petitioners' efforts to conceal their exportations by falsely valuing their mirrors and sending them to Western European countries before they were transshipped to the Soviet Union made abundantly clear petitioners' understanding that the validated license requirement applied. Petitioners were convicted on the basis of jury verdicts covering all elements of their offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00366

Supreme Court, U.S.
F I L E D
AUG 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1708

In the Supreme Court Of The United States

OCTOBER TERM, 1989

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

Argument..... 1

I. The solicitor's brief in opposition does not effectively attack or dispute the basic grounds upon which petitioners base their petition for certiorari..... 2

II. The exculpatory evidence suppressed by the prosecution would have been admissible..... 6

Conclusion..... 10

TABLE OF AUTHORITIES

	Page
Cases:	
Barefoot v. *Estelle*, 463 U.S. 880 (1982).....	8
United States v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987).....	4,5,10
United States v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983).....	4,5
*Spring Co.*v. *Edgar*, 99 U.S. 645 (1879).....	8
Statutes and regulations:	
Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969), *as amended by* Pub. L. No. 92-412, 86 Stat. 644 (1972) and Pub. L. No. 93-500, 88 Stat. 1553 (1974) (current version at 50 U.S.C. app. §§ 2401 -2420 (1982 & Supp. IV 1986)).....	*passim*
Commodity Control List, 15 C.F.R. 399.1 ...	*passim*

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REPLY BRIEF OF PETITIONER

On April 29, 1989 petitioners Spawr Optical Research Inc., Walter J. Spawr, and Frances Spawr submitted to this Court their petition for a writ of certiorari to review the judgement of the Court of Appeals for the Ninth Circuit entered in this case on December 29, 1988. On July 26, 1989, the Solicitor General filed his Brief for the United States in Opposition [hereinafter, Brief in Opposition]. Petitioners are aware that only unusual circumstances justify submission to this Court of a brief in reply to that of the Solicitor. Petitioners respectfully submit that two such unusual circumstances exist in the present case.

I.
THE SOLICITOR'S BRIEF IN OPPOSITION DOES NOT EFFECTIVELY ATTACK OR DISPUTE THE BASIC GROUNDS UPON WHICH PETITIONERS BASE THEIR PETITION FOR CERTIORARI

The Solicitor's Brief in opposition does not effectively attack or dispute the basic grounds upon which petitioners base their petition for certiorari:

First, petitioners based their plea for a writ of certiorari on the premise that the decision by the divided panel of the Ninth Circuit in this case established a new interpretation of the Export Administration Act of 1969, *as amended*, [hereinafter, the EAA or the Act] as to the burden of proof the government must shoulder in criminal prosecutions under the Act. The petitioners asserted that Judge Pregerson, dissenting, was correct when he held that the majority had misconstrued the EAA when it held that the Secretary of Commerce (not the judge and/or jury) had plenary unreviewable power to make the guilt-determinative finding of fact whether a commodity or technology was in fact listed on the Commodity Control List [hereinafter, the CCL] at the time it was exported.

The Solicitor's Brief in Opposition does not contradict petitioners' claim. Indeed, the Solicitor explicitly states, "We do not subscribe to that portion of the Court of Appeals' reasoning which suggests that illegal exportation cases can never involve an issue of fact as to whether a validated license is required for a particular commodity." Brief in Opposition at 20. The Solicitor also concedes that "The Court of Appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive . . . ." *Id.*, at 21.

This is precisely the point that is being made by the petitioners, by Judge Pregerson and by the *Amici* who have filed briefs in support of this petition for certiorari. The divided panel of the Ninth Circuit has enunciated as the law of that circuit an unqualified judicial interpretation of the EAA which

absolves the government from proving beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. The controlling precedent in the Ninth Circuit, unless it is reviewed and reversed by this Court, will be that once the Secretary asserts the commodity was listed on the CCL at the time of export, this is no longer a "triable issue," but rather:

> Right or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged-offenses beyond a reasonable doubt, that the Spawrs' mirrors here were included on the CCL and therefore subject to the licensing requirement.

App. 12(a).

The Solicitor seeks to brush aside this crucial reality by stating, "Although the Court of Appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive, its analysis fully supports the narrower proposition that disposes of this case, which is that the particular issues petitioners seek to raise would intrude on judgements reserved for the Secretary." Brief in Opposition at 21.

The point is that the divided panel *did* overstate the scope of the issues "reserved for the Secretary" and as a result established a sweeping precedent that would absolve the government from having to prove beyond a reasonable doubt the key, guilt-determinative element of the crime, *i.e.* that the commodity or technology was in fact listed on the CCL at the time it was exported. The fact that the divided panel *might* have produced a "narrower" decision and thereby avoided what the Solicitor acknowledges to be an "overstatement" of "the nature of the issues on which the Secretary's determination is conclusive" is irrelevant. The reality is that the divided panel did not do so. Instead, it made a sweeping decision which

construes the EAA in a manner that suffers from serious constitutional infirmities.

The second basis upon which petitioners based their plea for a writ of certiorari is that this novel interpretation of the EAA by the divided panel conflicts, *inter alia*, with *United States v. Gregg*, 829 F.2d 1430 (1987), in which the Court of Appeals for the Eighth Circuit interpreted the EAA to require the government to prove beyond a reasonable doubt that the commodity or technology in question was in fact listed on the CCL at the time of the export. The Solicitor in a single sentence in footnote 15 misstates or misinterprets the holding in *Gregg* which he claims, without benefit of supporting analysis, to be "consistent" with his view of the Government's burden of proof.

What, precisely, constitutes the Solicitor's view of the government's burden of proof is unclear. At page 11 of the Brief in Opposition the Solicitor alleges that "the government was required to prove that the laser mirrors that petitioners exported to the Soviet Union were included within the portion of the Commodity Control List that specified the commodities to which the validated licensing requirement applied." Yet, the issue of whether the mirrors were listed on the CCL is precisely the issue which the divided panel held not to be a "triable issue." It is the issue which the Solicitor and the divided panel hold to be one of the issues "on which the Secretary's determination is conclusive." The Solicitor in the same footnote 15 exhibits similar confusion with respect to *United States* v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983), which in fact is completely consistent with *Gregg*, 829 F.2d 1430, and in conflict with the holding of the divided panel in the instant case. As Judge Pregerson points out, the court in *Moller-Butcher*, 560 F. Supp. 550, "makes clear the distinction between judicial review of (1) whether the Secretary actually did place a commodity on the CCL - a question of fact - and (2) whether the Secretary should have placed the commodity on the

list - a question of advisability." App. 14(a). The Solicitor in footnote 15 appears to have blurred this distinction just as the divided panel did. In any event a fair reading of *Gregg* , 829 F.2d 1430 (and *Moller-Butcher*, 560 F.Supp. 550) compels the conclusion that these cases conflict with the holding of the divided panel in this case.

The third basis relied upon by petitioners for grant of certiorari is simply uncontested by the Solicitor. Petitioners contend that as a result of the decision by the divided panel the law has become confused and conflicting regarding the prosecution's burden of proof in a criminal proceeding alleging violation of the EAA, a major law regulating export of commodities and technology which impacts this country's international trade, its economy, its foreign policy and national security. This claim is supported by two briefs submitted by *Amici Curiae* in support of this petition for certiorari.

One of these briefs shows that, "existing conflicts among the Circuits and resulting uncertainty in application of American Criminal Law through the enforcement of the Export Administration Act are impairing the basis for scientific discussion." Brief of the Optical Society of America, Inc. and the Society of Photo-Optical Instrumentation Engineers as *Amici Curiae* in Support of Petitioners at 3-4. In addition to this First Amendment concern, these *Amici* also stated, "The Society is further concerned that misapplication and conclusive effect of administrative assertions given by the panel may impair the Sixth Amendment jury trial rights of scientists." *Id.* at 4.

The chilling effect of the decision by the divided panel of the Ninth Circuit on free communication within the scientific community is parallelled by the far reaching adverse impacts on the United States trade in high Technology commodities that will result if this decision is not reversed. The Laser and Electro-Optical Manufactures Association (LEOMA) which represents companies that manufacture more than ninety percent

of the laser and electro-optical equipment produced in North America, characterized the issue of the government's burden of proof in criminal proceedings under the EAA as "an issue of ultimate importance to our industry, and to all of the United States industrial and high technology establishment." LEOMA Brief as *Amicus Curiae* at 2.

Thus, there can be no doubt that this case raises an unresolved issue of the highest national importance. Until there is a clear and uniform national rule on the government's burden of proof, the uncertainty will be intolerable.

Finally, petitioners also based their petition for certiorari on the ground that Judge Pregerson was correct when he held that the novel interpretation of the EAA adopted by the majority of the divided panel:

> [S]uffers from constitutional infirmities. The Fifth Amendment right to due process and the Sixth Amendment guarantees of a criminal defendant's right to trial by jury require not only that the government prove every element of a criminal offense beyond a reasonable doubt but also that each element be submitted to an impartial trier of fact.

App. 16(a). The Solicitor simply ignored these constitutional issues.

II.
THE EXCULPATORY EVIDENCE SUPPRESSED BY THE PROSECUTION WOULD HAVE BEEN ADMISSABLE

A second unusual circumstance which justifies the submission of this Reply Brief is that the Solicitor in his Brief of Opposition unveiled a new theory why petitioners were allegedly not prejudiced by the prosecution's concealment at trial of such expert witnesses as Dr. Hill and Colonel Saito who concededly would have testified that the Spawrs' mirrors were not in fact listed on the CCL. The Solicitor contends that "none of the evidence that petitioners now assert that their trial counsel

should have introduced, or that the prosecutor allegedly with held, was material or admissible." Brief in Opposition at 11. According to the Solicitor, the suppressed evidence would not have been admissible because:

> [T]he record does not reflect that any of the evidence relates to the *factual* issue framed by the Control List -- which is whether petitioners' laser mirrors were designed for CO_2 lasers whose characteristics made them subject to the validated licensing requirement [*i.e.* that the mirrors were specially designed for use with CO_2 lasers whose output exceeded 1200 watts].

Id. at 12 (emphasis in original).

The Solicitor's argument is unsound for two reasons. First, as the Brief in Opposition concedes, Dr. Hill's declaration states that had he been called as a witness at the criminal trial he would have testified that:

> [The] Spawr equipment was not an advanced technology laser mirror capable of reflecting a laser beam at the high power levels required for possible laser weapons applications . . . and . . . the items in question did not have, nor could they be adapted to have, or be redesigned and up-scaled to have weapons grade capability."

Id. at 13.

Because Dr. Hill did not spell out in his *Declaration* (Pet. App. 44a.) that the phrase, "high power levels required for possible laser weapons applications" refers to and is another way of stating the 1200 watt standard contained in the CCL, the Solicitor characterized his declaration as the opinion of a "private consultant" and concludes that such opinion would have been "inadmissible" at the trial.

On the contrary, if Dr. Hill had testified at the trial and an objection had been lodged by the prosecution to the admissibility of his testimony that the mirrors did not have and could not attain weapon grade capability, any competent

counsel could have overcome the objection by rephrasing the question to make clear that Dr. Hill's conclusion was based on the fact that the mirrors were not designed for use with CO_2 lasers whose output exceeded 1200 watts.

Further, the Solicitor does not dispute that Dr. Hill is an expert. In fact, Dr. Hill is generally regarded as the father of the high-powered laser and while employed by the United States Government as chief scientist for the U. S. Air Force Weapons Laboratory was responsible for the enactment of the 1200 watt standard. It is well settled that the opinion of a qualified expert witness is admissible as evidence in criminal proceedings to aid the factfinder in making determinations of fact. *Barefoot* v. *Estelle*, 463 U.S. 880, 903 (1982); *Spring Co.* v. *Edgar,* 99 U.S. 645, 657 (1879). If the prosecution had challenged the validity of Dr. Hill's expert opinion that the Spawr mirrors were not and could not be listed on the CCL, it would have been adduced through testimony that his conclusion was based on the fact that the Spawr mirrors were not specially designed for use with CO_2 lasers with an output exceeding 1200 watts.

Thus, the Solicitor's new argument that the testimony of Dr. Hill *et al.* would not have been admissible in evidence at the trial and hence its suppression was not prejudicial to petitioners is not well-taken, is unsupported as a matter of law and inconsistent with the facts. It is equally clear that, but for the prosecutions concealment of Dr. Hill *et al.*, the defense could have adduced substantial expert testimony to off set and rebut the prosecution witnesses. The testimony of Dr. Hill *et al.* would have been as admissible as the opinion evidence supplied by the prosecution witnesses as to whether the mirrors were specially designed for use with CO_2 lasers whose output exceeded 1200 watts. The Solicitor's inadmissibility argument is completely without merit.

The Solicitor also attempted to deprecate the importance of the prosecution's suppression of the so-called Boidock

document (*See* Pet. Cert. at 22-25.) by making the unwarranted claim that "petitioners' argument rests on a serious distortion of the contents of the documents."

Any fair and rational reading of petitioners' argument belies the notion that petitioners "seriously distorted" the contents of the document in question. That document clearly shows that the Department of Commerce did indeed make two findings of fact concerning the Spawr mirrors before the Spawrs exported them:

1. that the mirrors at the time of export had "appropriate non-strategic end use ... ;" and

2. that the mirrors at the time of export fell in the category of "Non-COCOM foreign availability" because "comparable laser mirrors are available from Mirror Techneque of Switzerland, a division of Laser Techneque of Switzerland." Pet. App. 43a.

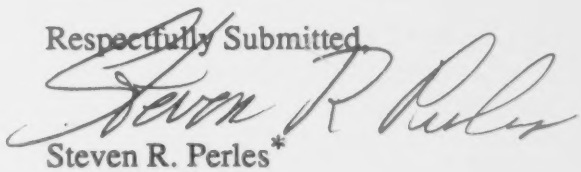
Just because these findings of fact by the Secretary of Commerce were made in a recommendation of the Department of Commerce that was subsequently rescinded as an act of comity to another Executive Branch member of the Operating Committee does not alter the fact that these findings of fact about the foreign availability and non-strategic end use of the Spawr mirrors reflected the Commerce Department's position at the time of export. There is thus no "serious distortion" in petitioners' interpretation of the document in question. The point petitioner seeks to make is that if this document had not been suppressed by the prosecution, the jury would have known that the Secretary of Commerce had found the mirrors in question had "appropriate non-strategic end use" and that they were freely available in Switzerland for purchase by Russians or any other customer of whatever nationality and thereby could not as a matter of law be listed on the CCL. It is impossible to conceive of a more exculpatory showing. The suppression of this document was fatally prejudicial to the Spawrs.

Conclusion

The Solicitor admits that he does not "subscribe to that portion of the Court of Appeals' reasoning which suggest that illegal exportation cases can never involve an issue of fact as to whether a validated license is required for a particular commodity . . ." and "the Court of Appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive . . . ." Brief in Opposition at 20, 21. These admissions by the Solicitor compound the confusion that has existed since the publication of the decision by the divided panel. The *Amici* explain in detail how this confusion is inflicting a chilling effect on, *inter alia,* scientific discourse, on international trade, and on the high technology sector of United States industry. The novel reading of the EAA by the divided panel not only creates this confusion but it conflicts with the Eighth Circuits decision in *United States* v. *Gregg*, 829 F.2d 1430. It also creates unnecessary Constitutional infirmities implicating the First, the Fifth and the Sixth Amendments to the Constitution.

Petitioners pray this Court will grant certiorari to review this decision.

Respectfully Submitted,



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Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1708

In the Supreme Court Of The United States

OCTOBER TERM, 1988

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENT

BRIEF OF THE LASER AND ELECTRO-OPTICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus 1

Argument

I. Introduction and Summary of Argument 3

II. The Instant Matter is One of National Significance Potentially Affecting All Exporters, The International Competitiveness of U.S. Businesses, and the Balance of Trade and Payments 4

III. After The Decision of the Divided Panel of The Court of Appeals for the Ninth Circuit In the Spawr Case, Confusion Exists About The Government's Burden of Proof in Criminal Prosecutions to Enforce The Export Administration Act 9

Conclusion 12

TABLE OF AUTHORITIES

CASES

United States v. *Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987)..... 9

United States v. *Mandel*, 696 F. Supp. 505 (E.D. Cal. 1988)..... 10

United States v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983)..... 9

MISCELLANEOUS

Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969), *as amended by* Pub. L. No. 92-412, 86 Stat. 644 (1972) and Pub. L. No. 93-500, 88 Stat. 1553 (1974) (current version at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. IV 1986))..... *passim*

Use of Export Controls and Export Credits for Foreign Policy Purposes: Hearings on the Increasing Use by the Executive Branch of Protections on U.S. Exports and Export Credits for the Purpose of Promoting Foreign Policy Objectives Before the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess. 146, (1978)..... 6

Balancing the National Interest - U.S. National Security Export Controls and Global Economic Competition, National Academy Press, Washington, D.C. (1987)..... 7

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INTEREST OF *AMICUS*

The Laser and Electro-Optical Manufacturers Association (LEOMA), formerly the Laser Association of America, is a non-profit trade association representing companies which manufacture more than 90 percent of the laser and electro-optical equipment produced in North America. LEOMA is concerned with both the scientific and the economic progress and well-being of this critically important industry. The laser and electro-optical products this industry produces and the technology it develops plays an integral role in

numerous other industries that comprise the high technology component of United States industry as well as basic manufacturing industry generally.

One important factor involved in the economic stability and progress of the laser and electro-optical industry and the high technology sector of United States industry is to keep pace with world competition in both the quality and price of products and in technological progress. Thus the export market and the exchange of goods and ideas throughout the world is essential to maintaining United States leadership in world high technology competition.

LEOMA has followed the *Spawr* case for several years and its Board of Directors and members believe that his case raises an issue of ultimate importance to our industry, and to all of the United States industrial and high technology establishment. This issue is also relevant to this nation's deteriorating position with respect to the balance of trade and payments. Resolution of this issue is essential if we are to maintain this nation's world leadership in the high technology market of the future.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case raises the issue of what is the United States government's burden of proof in criminal prosecutions under the Export Administration Act for exporting without a license commodities or technologies that have been listed on the Control List by the Secretary of Commerce. Until the decision by the divided panel of the Court of Appeals for the Ninth Circuit in the *Spawr* case, it seemed clear that the government, in order to obtain a conviction, must prove that the commodity or technology had been listed on the Control List by the Secretary, that it had been willfully and intentionally exported, and that no validated license had been issued by the Secretary of Commerce permitting the export.

The decision by the divided panel of the court below would relieve the government prosecutor of the necessity of proving beyond a reasonable doubt before the trier of fact, be it judge or jury, that the commodity or technology had in fact been listed on the Control List. Instead, according to the divided panel, if the prosecution alleges that the commodity or technology has been placed on the Control List, this allegation must be accepted as proven. The divided panel stated that it did not matter whether the allegation was right or wrong, the trier of fact in the criminal proceeding must accept the allegation as having been proved. Moreover, the accused exporter would not even be allowed to dispute or rebut this allegation that the

commodity or technology had been placed on the Control List because, according to the divided panel, the issue is not one that a judge or jury is competent to consider. Under this holding, once the prosecution shows that a commodity or technology has been exported intentionally, and not to have been exported as a result of some excusable mistake, the criminal conviction of the exporter is inevitable.

This view of the government's burden of proof conflicts sharply with that expressed by courts in the First and Eighth Circuits and with a more recently decided case in the Ninth Circuit as well. It also raises a fundamental Constitutional issue whether such a special system of criminal procedure denies trial by jury under the Sixth Amendment and Due Process under the Fifth Amendment. It is of the utmost public importance that this conflict be resolved.

II. THE INSTANT MATTER IS ONE OF NATIONAL SIGNIFICANCE POTENTIALLY AFFECTING ALL EXPORTERS, THE INTERNATIONAL COMPETITIVENESS OF U.S. BUSINESSES, AND THE BALANCE OF TRADE AND PAYMENTS

Historically, the United States has not imposed export controls except in times of war or national emergency. Largely in response to "Cold War" considerations, Congress, in 1949, enacted the Export Control Act (ECA) which imposed a comprehensive system of export controls intended primarily to prevent export to the Soviet bloc of commodities or data that

would be of significant value to Warsaw Pact military systems. The ECA granted the Executive Branch virtually plenary power to cut off the export trade of the United States by denying export privileges to any person. The Act provides, "To effectuate the policies set forth in Section 2 hereof, the President may prohibit or curtail the exportation from the United States, its Territories, and possessions, of any articles, materials or supplies, including technical data, except under rules and regulations as he shall prescribe." 50 U.S.C. App. Sec. 2023(a) (1982). The President has delegated this authority to the Secretary of Commerce and the program is administered by the Office of Export Control of the Bureau of International Commerce.

Section 2 of the Act articulates three policies which the President is directed to effectuate by the imposition of export controls: protection of commodities in short supply; furtherance of United States foreign policy; and protection of national security.

The regulatory apparatus to control exports under the Export Administration Act (EAA), which succeeded the ECA, is a federal export licensure system which includes, *inter alia*, individual validated licenses (IVLs) which authorize the export of a specific commodity that has been determined to be "nonstrategic," which means that the item to be exported will not enhance the scientific, technical or industrial capability of the nation that is the ultimate recipient in a manner that will be harmful to United States national security.

The critical element in this licensing system is the Commodity Control List. The Act directs the Secretary of Commerce to maintain a Commodity Control List (CCL) which catalogues commodities and technology. 50 U.S.C. App. Sec. 2403(b) (1982). The CCL specifies the types of export license required for a specific export to a stated destination. *Id.* and Section 2403(c)(l). Thus, whenever a commodity is listed on the CCL, it cannot be lawfully exported unless the exporter first obtains a validated license authorizing the export.

As early as 1978, Secretary of State Dean Rusk recognized the national significance of the Export Administration Act stating:

> We should begin by reminding ourselves that trade occurs when it is of benefit to both parties. When we refuse to trade for security or political reasons, we should recall that we are depriving ourselves of the benefit of that trade, whether in the form of convertible currencies or goods or services which we ourselves need for our national life. During the postwar decades when we were in a very strong trade position, many of us tended to think of trade as a "favor" which we were doing for somebody else. That attitude is a luxury which we may not be able to afford with our present large trade deficit.

Use of Export Controls and Export Credits for Foreign Policy Purposes: Hearings on the Increasing Use by the Executive Branch of Protections on U.S. Exports and Export Credits for the Purpose of Promoting Foreign Policy Objectives Before the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess. 146 (1978).

The trade deficit has increased many-fold in the ensuing decade and underscores the urgency of the statement put forward by Secretary Rusk more than a decade ago. The United States paramountcy in the design and manufacture of high technology commodities has eroded. Technological progress by other nations made available alternative sources of such commodities which the United States could not effectively control. Export regulation by the United States exacted an increasing economic penalty as the United States exports were replaced by alternative foreign sources due to the delay inherent in the United States export control regulatory system.

The National Academy of Science (NAS) assembled a panel of experts to consider the "Impact of National Security Controls on International Technology Transfer." Balancing The National Interest - U.S.National Security Export Controls and Global Economic Competition, National Academy Press, Washington, D.C. (1987), hereafter cited as NAS Report. The purpose of this study was, "to seek strategies to regulate the international transfer of technology through industrial channels in such a manner as to balance the national objectives of national security, economic vitality, scientific and technological advance, and commercial, educational, and personal freedom." *Id.* at 181.

The NAS Panel's study was comprehensive. It was supported by both the NAS Committee on Science, Engineering, and Public Policy, *Id* . at v, and by the efforts of

an expert professional staff who organized briefings by numerous relevant federal agencies, including, *inter alia,* the Central Intelligence Agency, the FBI, the Departments of Commerce, Defense, State and Treasury, the National Aeronautics and Space Agency and the Department of Justice. *Id.* at iv. The professional staff also organized the Panel's foreign fact-finding missions (which included on-site investigations in six European and five Asian countries) and assisted in the preparation of the reports on the findings from these foreign visits. *Id.* App. B, at 183-220. Given the experience and qualifications of the investigation's participants, the scope and thoroughness of the investigation, and the in-depth access to the current facts and evidence that comprise the reality of the administration of the EAA program, the NAS Report findings are clearly the most comprehensive and authoritative analysis ever conducted on the export control process.

Based in large part on data provided by the Department of Commerce, the NAS Report estimated that the Department's administration of the CCL has imposed a requirement for a validated license involving approval by the Department of Commerce prior to export of over 50% of all United States exports of non-military manufactured goods in 1985. *Id.* at 10. These exports that were subjected to prior approval licensing by the Department of Commerce had an estimated value of $62 billion. *Id.* Moreover, national security export controls apply to sales of commodities by the United States corporate affiliates abroad. The NAS Report estimated that the value of this

category of licensable commodities approximated an additional $22 billion in 1985, bringing the total volume of goods subjected to prior approval regulation to $84 billion. *Id.* at 29.

Thus, the universe of active export control regulation in 1985 encompassed more than one half of all United States exports. Since *Spawr* potentially affects exporters of all of these goods and services, it is clearly a case of national significance.

III. AFTER THE DECISION OF THE DIVIDED PANEL OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE SPAWR CASE, CONFUSION EXISTS ABOUT THE GOVERNMENT'S BURDEN OF PROOF IN CRIMINAL PROSECUTIONS TO ENFORCE THE EXPORT ADMINISTRATION ACT.

The relevance of the instant case to all exporters is clear. If the decision of the divided panel of the court below is not reviewed and reconciled with conflicting decisions by courts in the First and Eighth Circuits and a more recent decision in the Ninth Circuit, it will be impossible to know what constitutes the elements of the criminal sanction imposed by the EAA.

Under the decision in *United States v. Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983) and *United States v. Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987), the federal government must prove beyond a reasonable doubt that (1) the commodity or technology at issue was in fact listed on the Control List (and therefore a license was required by law); (2)

that the commodity or technology was in fact intentionally exported; and (3) that the exporter did not obtain a validated license authorizing the export.

Under the decision in *United States v. Mandel*, 696 F. Supp. 505 (E.D. Cal. 1988), there would be an additional element required for the government's burden of proof, *i.e.*, that the commodity was properly included on the Control List and was not freely available abroad.

Under the decision of the divided panel of the court below, the issue of whether the commodity or technology in question had, in fact, been placed on the Control List need not be proven by the prosecution. If the prosecution alleges the commodity or technology is in fact on the Control List, the allegation would be conclusive and irrebutable, even though it is guilt-determinative. The court below even explicitly stated that it did not matter whether the allegation was right or wrong, it was nevertheless binding on the trier of fact.

Given this disarray in the decisions governing the vital issue of what the elements of this federal crime are, the export industry by necessity must assume they will be subjected to the rule enunciated by the divided panel in the Ninth Circuit. Under this rule, no prudent exporter would risk exporting any commodity or technology without first having made a license application. This is particularly true in view of the position taken by the federal government in the instant case, and in *Mandel*.

It is not the purpose of this Brief to argue that the divided panel misconstrued the EAA and that Congress did not intend to make such a plenary grant of power to the President and the Secretary of Commerce. Nor is it the purpose of this Brief to argue that such a delegation raises Constitutional questions of the first magnitude. Rather, this Brief seeks to make the point that if the rule of the divided panel prevails, or if these conflicting rules are not resolved, that the United States export control system will become overburdened. Exporters will be reluctant to incur the risk of exporting any commodity or technology when the Secretary of Commerce, for whatever reason, can allege after the fact of export that the commodity or technology was on the Control List and required an export license. In such a system the mere act of exporting a commodity or technology may be made a crime. Whether the allegation is right or wrong is irrelevant, according to the court below. The normal judicial machinery - judges and trial by jury - would be powerless to check any abuse because under the decision of the divided panel of the court below, they are not competent to rule on the issue of whether in fact the commodity or technology has been placed on the Control List.

The practical result is that many exporters would be reluctant to incur such a risk and a great many more exports would be made only after seeking a license. The present system is inadequate to administer such a volume of applications. The result is plain. United States exports of high technology goods and data would be delayed by an

overburdened system to the sole advantage of foreign competitors able to promptly fill orders that American businesses would be unable to supply in a timely fashion.

CONCLUSION

LEOMA respectfully urges this Court to grant certiorari to clarify the law and resolve this vital issue.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1708

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OCTOBER TERM, 1988

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WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OPTICAL SOCIETY OF AMERICA, INC. AND THE SOCIETY OF PHOTO-OPTICAL INSTRUMENTATION ENGINEERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Table of Contents

Table of Authorities iii

Interest of Amici 1

Statement of the Case 7

Summary of Argument 8

Argument 8

I. THERE IS A CONFLICT IN THE CIRCUITS WHICH CREATES UNCERTAINTY WITHIN THE SCIENTIFIC COMMUNITY AS TO THE PROPER STANDARD FOR CRIMINAL PROSECUTION UNDER THE EAA 8

II. THE DECISION OF THE DIVIDED PANEL BELOW MAY HAVE DENIED PETITIONERS' SIXTH AMENDMENT RIGHT TO JURY TRIAL BY GIVING CONCLUSIVE EFFECT TO THE GOVERNMENT'S POSITION ON DISPUTED ISSUES OF FACT IN A CRIMINAL TRIAL 10

III. CONCLUSIVE EFFECT OF DISPUTED ISSUES OF FACT IN CRIMINAL PROSECUTIONS CONCERNING EXCHANGE OF SCIENTIFIC INFORMATION MAY CHILL SCIENTIFIC DEBATE AND THE EXCHANGE OF SCIENTIFIC IDEAS PROTECTED BY THE FIRST AMENDMENT 12

Conclusion 15

TABLE OF AUTHORITIES

CASES	PAGE
Brady v. *Maryland*, 373 U.S. 83 (1963)	7
Grayned v. *City of Rockford*, 408 U.S. 106 (1972)	13
In re Winship, 397 U.S. 358 (1970)	11
City of Lakewood v. *Plain Dealer Publishing Co.*, __U.S.__ , 108 S.Ct. 2138 (1988)	14
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	13
Sandstrom v. *Montana*, 442 U.S. 510 (1979) . . .	11
United States v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987), cert. denied, __ U.S. __, 108 S.Ct. 1994 (1988)	9
United States v. *Mandel*, 696 F. Supp. 505 (E.D.Cal. 1988)	9
United States v. *Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988)	*passim*
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 754 (1976)	12

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I . . . . . *passim*

U.S. CONST. amend VI 10

STATUTES & REGULATIONS

Export Administration Act of 1969, Pub.L. No. 91-184, 83 Stat. 841(1969), *as amended by* Pub. L. No. 92-412, 86 Stat. 644(1972) and Pub. L. No. 93-500, 88 Stat. 1553(1974)(current version at 50 U.S.C. app. §§ 2401-2420)(1982 & Supp. IV 1986) . . . . . *passim*

15 C.F.R. Part 379 (1988) . . . . . *passim*

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NO. 88-1708

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OPTICAL SOCIETY OF AMERICA, INC. AND THE SOCIETY OF PHOTO-OPTICAL INSTRUMENTATION ENGINEERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Optical Society of America

The Optical Society of America, Inc. ("Society"), founded in 1916, is one of the largest scientific societies in the world concerned with all aspects of the scientific and commercial applications of light.

[1]Through their counsel, the parties in this proceeding have consented to the appearance of the *Amici* and letters of consent have been filed with the Clerk pursuant to Rule 36.

The Society has 10,000 members worldwide who are primarily physicists and engineers. The membership is divided into technical areas, each of which is represented by a technical division. These divisions are photonics, quantum electronics, optical sciences, optical technology, and vision and medical optics. Every industrial nation in the world is represented among the membership; nearly 20% of the membership resides outside of the United States. The membership includes scientists and engineers from China, the Soviet Union and many developing nations.

The Society assists in the operation of many international scientific organizations. Among these are the International Commission for Optics, the International Quantum Electronics Council, the International Management Committee for the Conference on Integrated Optics and Optical Fiber Communication, and the International Steering Committee for the Optical Fiber Sensors Conference. The Society also sponsors a program of international lecturers to developing nations and has formal agreements with optical societies of other countries for exchange of visiting scholars.

The Society publishes five peer-reviewed scientific journals which report advances in optical science and engineering. Approximately three-quarters of the advances in optical science and engineering are published in the journals of the Society. Some 14,000 pages of technical literature will appear in these five journals in 1989. In addition to the individual subscriptions, libraries throughout the world purchase subscriptions to the journals. Nearly 25% of the nonmember subscribers to the journals reside outside of the United States.

The quality of American science is recognized throughout the world. This accomplishment is due not only to the ability of individuals, but to the considerable resources already devoted to building academic, governmental and commercial institutions which can generate, evaluate, modify, combine and refine previous advances. The interest of the *amicus* is in protecting a climate in which scientific information and developments can be comfortably examined and the current level of American participation in world science can be maintained. The Society has been able to sponsor its publications, conduct technical meetings and secure worldwide cooperation because American law protects a climate of scientific inquiry of immense appeal throughout the world.

The importance of the American scientific climate is accentuated by the growth of science as well as recent improvements in world diplomatic relationships. These improvements present the possibility of more harmonious scientific dialogue between previous adversaries. These developments are awaited with anticipation and hope by the scientific community.

Although the Society is well aware that certain types of information may require restricted circulation, the Society also recognizes, from long experience, that the superiority of American science and engineering depends upon the publication and receipt by American scientists and institutions of scientific information. The *amicus* has a substantial interest that this first amendment interest be properly protected.

The concern of the Society is that existing conflicts among the Circuits and resulting uncertainty in application of American criminal law through the enforcement of the

Export Administration Act are impairing the basis for scientific discussion. The Society is further concerned that misapplication and conclusive effect of administrative assertions given by the panel may impair the sixth amendment jury trial rights of scientists.

Although the Society takes no position on the merits of the underlying controversy, criminal prosecution of scientists in the midst of these conflicts will continue a chilling effect on the process and substance of scientific communications. This situation warrants clarification and explanation of applicable law by this Court. With this interpretation, responsible scientists and scientific institutions will be able to understand their responsibilities and continue a tradition of commitment to scientific exchange under the law.

Society of Photo-Optical Instrumentation Engineers

The Society of Photo-Optical Instrumentation Engineers ("SPIE") is a non-profit society dedicated to advancing engineering and scientific application of optical and optoelectronic instrumentation, systems and technology. SPIE was founded in 1955 and has a membership of almost 10,000 persons from all over the world, but mostly from the United States of America.

SPIE is dedicated to facilitating the communication of new developments and applications to the scientific, engineering, and user communities through publications and symposia. SPIE sponsors four major meetings each year in the four corners of the United States. Each such meeting has between 3,000 and 8,000 attendees. At these meetings, papers are presented concerning recent developments in

the field of optical engineering, state-of-the-art optical equipment is exhibited, and tutorials are presented for continuing education purposes. The proceedings of these meetings are published by SPIE, thereby completing the cycle of information exchange. Other, smaller, regional meetings are held on approximately a monthly basis. SPIE has recently expanded to Europe and it is beginning to explore the Pacific Rim.

SPIE is vitally concerned with protecting the freedom of scientists and engineers to communicate with each other about their work. Since the Commodity Control List ("CCL") maintained pursuant to the Export Administration Act includes "technology" as well as "goods," it has frequently been used to restrict communication concerning controlled commodities. It is extremely important to SPIE that the authority of the Secretary of Commerce to place readily available common nonstrategic items on the CCL is made subject to the reasonable limitations intended by Congress and the Constitution; otherwise, the ability of scientists and engineers to facilitate the advancement of technologies through symposia and other forms of professional communication among themselves will be seriously hindered.

In addition, the possibility that the Secretary may exercise authority to conclusively determine, after the fact, whether an item was covered by the CCL for criminal prosecution purposes has frightening implications for members of SPIE and the rest of the scientific community. Under such authority, prosecution could occur even if a certain technology was not expressly included on the CCL. The Secretary could initiate a criminal prosecution against a scientist who had discussed such technology at a symposium, on the grounds that such technology was

implicitly within the meaning of some other item on the CCL. The Secretary's retroactive interpretation of the scope of that other item would be absolutely conclusive, and the accused scientist would not even be allowed to offer evidence that the technology in question was not intended to be included on the CCL. Such absolute and unaccountable authority in the hands of the Secretary would deny SPIE's members due process of law with respect to an issue of fundamental importance -- whether or not the subjects of their technical papers were in fact included on the CCL. It would also have a significant and detrimental chilling effect upon the scientific community in general.

SPIE strongly believes that permitting the Secretary to impose what amounts to censorship upon exchanges of nonstrategic scientific information can only emasculate the progress of science and engineering. Scientists thrive on the interchange of ideas and problems, and science will surely wither if scientists are not allowed to talk to each other.

While SPIE takes no position with respect to the specific facts of the *Spawr* case itself, SPIE believes that the authority of the Secretary to create criminal liability pursuant to the Export Administration Act must be subject to certain reasonable limitations and the right to appeal in the usual forums of our nation. SPIE believes that the situation created by the existing conflicts among the Circuits has a present chilling effect upon scientific discourse, and therefore requires clarification and explanation of the application of the law by this Court.

STATEMENT OF THE CASE

The Secretary of Commerce, under the authority of the Export Administration Act ("EAA"), publishes a list of commodities for which an export license is required. This list is the Commodities Control List ("CCL").

Petitioners Spawr Optical Research, Inc. and Walter and Frances Spawr were convicted of exporting optical laser mirrors without a license as purportedly required by the CCL. The trial court permitted the prosecution's introduction of a document pertaining to restrictions on export of optical elements and appliances to certain limited countries which the government held out as the CCL. However, this document was not the CCL. Exculpatory material required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), withheld from the defense, suggested that the CCL did not require a license for export of the Spawr's mirrors. In ruling on the Spawr's motion for reconsideration under 28 U.S.C. § 2255, the trial court found that the Spawrs were not "materially prejudiced" because the issue of whether the Spawrs' optical mirrors were actually listed on the CCL was thought by the court not to be a triable issue of fact.

A sharply divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, holding that a defendant may not judicially challenge an Executive Branch determination of whether a product meets the description of an item listed on the CCL.

SUMMARY OF ARGUMENT

The decision in *Spawr* below has added to the confusion in the Circuits as to the proper burden of proof applicable to the EAA. By mandating conclusive effect of the government's position on a disputed issue of fact, the divided panel below may have denied the petitioners' constitutional right to a jury trial. The conflicting decisions in the Circuits have caused in uncertainty in the scientific community, which may result in substantially curtailed scientific debate and exchange of ideas. The *amici curiae* respectfully request the Court to grant the Spawrs' petition for a *writ of certiorari* in order to guard against the chilling effect the decision below casts on the release, exhange and receipt of scientific ideas protected by the first amendement.

ARGUMENT

I. THERE IS A CONFLICT IN THE CIRCUITS WHICH CREATES UNCERTAINTY WITHIN THE SCIENTIFIC COMMUNITY AS TO THE PROPER STANDARD FOR CRIMINAL PROSECUTION UNDER THE EAA

The decision below of the divided panel of the Court of Appeals for the Ninth Circuit adopted the prosecution argument that the government need not prove that a particular commodity or technology is in fact described by the CCL when exported or disseminated -- so long as the Secretary of Commerce asserts that it is on the list. In the court's view, a criminal defendant is forbidden to rebut even a plainly erroneous government assertion. "Right or

wrong, the trial court must accept this determination as a matter of law." *Spawr*, 864 F.2d at 1473.

The decision by the divided panel conflicts with the law in the Eighth Circuit. *United States* v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987) cert. denied, __ U.S. __, 108 S.Ct. 1994 (1988) also reviewed the essential elements which must be proved by the government to make out a violation of the EAA. The Eight Circuit in *Gregg*, 829 F.2d at 1437, held:

> [T]he Government needs to prove . . . that the item exported appears on the . . . Commodity Control List . . . and . . . that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without an appropriate license.

More recently, a federal district court in California enunciated a different rule which appears to conform even more closely to the provisions of the EAA. In *United States* v. *Mandel*, 696 F. Supp. 505, 514 (E.D.Cal. 1988), the court held that:

> . . . defendants are entitled to some form of judicial review of the Secretary's determination that the items they are accused of exporting met the statutory criteria for inclusion on the CCL.

Mandel further ruled that the government must prove that the commodity at issue was not available outside the United States in order to substantiate that the commodity was properly listed on the CCL.

This confusing succession of interpretations warrants clarification of the standards applied to the prosecution under the EAA of scientists and manufacturers exchanging scientific information and apparatus. Clarification by the Court is important to the American and international scientific communities.

II. THE DECISION OF THE DIVIDED PANEL BELOW MAY HAVE DENIED PETITIONERS' SIXTH AMENDMENT RIGHT TO A JURY TRIAL BY GIVING CONCLUSIVE EFFECT TO THE GOVERNMENT'S POSITION ON DISPUTED ISSUES OF FACT IN A CRIMINAL TRIAL

The pertinent CCL was a listing of items which covered 76 single-spaced pages and incorporated by reference many additional supplemental listings. Despite the extensive and apparently exhaustive listing of items in the CCL, many CCL listings consisted only of criteria which described items requiring an export license. The divided panel of the Ninth Circuit found that it was unnecessary for the jury to decide whether Spawr's product actually met those criteria. The court held:

> The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that the Spawrs' mirrors were included on the CCL. . . *Spawr*, 864 F.2d at 1473.

In *Spawr* the resolution of whether the Spawrs' mirrors met the criteria outlined by the CCL most certainly is a factual determination. Relieving the government of its need to present a factual basis for an alleged violation of

the EAA offends the sixth amendment principle that the government must prove every issue of the fact to the jury beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It is the jury which must determine each factual issue in a criminal trial. *Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979).

Judge Pregerson, dissenting from the Ninth Circuit panel's opinion, summarized the flawed position of the panel:

> [It is] the majority's position that in a criminal trial the fact finder is precluded from determining whether a commodity was in fact listed on the CCL at the time of the alleged criminal violation. *Spawr*, 864 F.2d at 1474.

After reviewing a previous decision involving the EAA and the constitutional infirmities raised by the majority's opinion, Judge Pregerson concluded:

> Whether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is *an essential element of the offenses allegedly committed* by them. It was for the jury, *not* the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were *in fact* an item listed on the CCL. (Emphasis supplied). *Id.*

In the situations where scientists may be subjected to criminal prosecution, the right to trial by jury should not be impaired. This Court should review the decision below.

III. CONCLUSIVE EFFECT OF DISPUTED ISSUES OF FACT IN CRIMINAL PROSECUTIONS CONCERNING EXCHANGE OF SCIENTIFIC INFORMATION MAY CHILL SCIENTIFIC DEBATE AND THE EXCHANGE OF SCIENTIFIC IDEAS PROTECTED BY THE FIRST AMENDMENT

American science depends upon the protection of the first amendment. The development of scientific theory and scientific research requires that scientists and engineers be able to present and receive ideas. The first amendment protects the interest of scientists both as conveyors and as recipients of scientific information.[2]

The regulations interpreting the EAA make clear the belief of the Commerce Department that the communication of scientific information discoveries and technical data are governed by the EAA and the CCL. 15 C.F.R. §379 (1988). Communication of scientific information which directly and significantly relates to industrial processes requires a license for export.[3]

By the terms of the regulations, a scientist who presents "technical data" (*i.e.*, scientific information or

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[2]*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 754, 756 (1976) (stating that "Freedom of speech presupposes a willing speaker. But when a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." (footnote omitted))

[3] "Dissemination" of scientific information not "directly and significantly related to design, production, or utilization in industrial processes" is permissible without the requirement that a special license be sought for export. 15 C.F.R. § 397.3(b) (1988).

knowledge) at a conference in this country to attendees consisting of scientists from other countries has "exported" that information.[4]

Permitting the determination of guilt in a criminal prosecution to rest in the sole discretion of the Department of Commerce invites imposition of arbitrary and discriminatory application of the EAA upon scientific expression. Not only does this offend the sixth amendment, it encourages scientists to abort the presentation of scientific findings to the international scientific community. In order to preserve an "uninhibited marketplace of ideas", *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), explicit and narrowly-tailored standards of enforcement are required by the first amendment.

Customary first amendment overbreadth and vagueness issues arise from the imprecise drafting of a statute or regulation. The concern springs from the consequences of the overbroad or vague drafting, which may result in the arbitrary application of law.[5] In the present case, the arbitrary and final determination of

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[4]"Export of technical data means...any release of technical data within the United States with the knowledge or intent that the data will be shipped or transmitted from the United States." 15 C.F.R. §379.1(b)(ii)(1988).

[5]*Grayned* v. *City of Rockford*, 408 U.S. 106, 108-109 (1972) (reasoning that ". . .if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . .[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked." (citations and footnotes omitted))

factual issues by the Department of Commerce as applied in a criminal prosecution threatens to chill the full participation of citizens in scientific and political discourse.

Recently, this Court considered the effect of a regulatory scheme to be applied in the sole discretion of a city official. *City of Lakewood* v. *Plain Dealer Publishing Co.*, __U.S.__, 108 S.Ct. 2138, 2147 (1988). This Court held:

> . . . a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

The reasoning of *City of Lakewood* applies with even greater force in this criminal case.

The uncertainties which surround criminal prosecution under the Export Administration Act ("EAA") have already chilled a strong first amendment interest of scientists in communicating and receiving scientific speech and ideas. The degree of confusion and its impact on the scientific process warrants review by this Court.

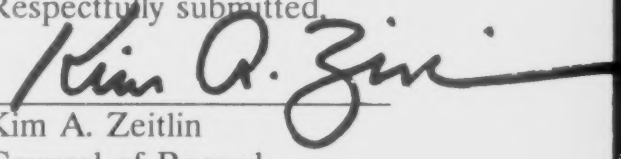
CONCLUSION

The effect of the conflict in the Circuits concerning criminal prosecutions under the EAA is to discourage scientists from attending meetings, publishing papers and initiating research subjects. The effect is to raise serious Sixth Amendment and First Amendment issues. Until this matter is resolved, scientists, technicians, and academicians who participate in a symposium or conference or who publish or disseminate scholarly papers and ideas run the risk that the Secretary of Commerce or his subordinate will initiate a prosecution -- and the accused scientist will not be permitted to rebut with fact the chief element of the criminal charge.

For the foregoing reasons, Amici Optical Society of America, Inc. and Society of Photo-Optical Instrumentation Engineers respectfully urges this Court to grant the petition for a *writ of certiorari*.

July 19, 1989

Respectfully submitted,



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